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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ALOYZAS BALSYS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 504—August Term, 1996

Docket No. 96-6144

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

ALOYZAS BALSYS, RESPONDENT-APPELLANT

Argued Oct. 21, 1996

Decided July 15, 1997

Before: MESKILL and CALABRESI, Circuit Judges, and BLOCK, District Judge.*

CALABRESI, Circuit Judge, with whom Judge BLOCK joins:

Aloyzas Balsys appeals from a decision and order of the United States District Court for the Eastern District of New York (Sterling Johnson, Jr., *Judge*), entered on March 13, 1996, granting the government's motion for an order compelling compliance with a Department of Justice Office of Special Investiga-

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* The Honorable Frederic Block, of the United States District Court for the Eastern District of New York, sitting by designation.

tions ("OSI") administrative subpoena that sought answers to deposition questions and requested documents as part of an investigation into whether Balsys lied on his immigration application about his activities during WWII.

In this appeal, we are asked to consider two questions that delineate the scope of the Fifth Amendment privilege against self-incrimination. First, we must determine whether the privilege protects a witness from being compelled to testify where there is a real and substantial risk that the testimony, or the evidence derived therefrom, will be used against him in a foreign criminal prosecution. Second, we must decide whether an alien's voluntary statements on an application for an entry visa to the United States constitute a waiver of the Fifth Amendment with respect to a deportation investigation concerning those statements.

We find that the language and purposes of the Fifth Amendment are best followed by allowing a witness with a real and substantial fear of foreign prosecution to invoke the privilege against self-incrimination in domestic proceedings, that permitting the privilege in such cases need not hamper the legitimate goals of the United States to a significantly greater degree than does invocation of the privilege in the face of domestic prosecution, and that this interpretation of the privilege is most consistent with the precedents of the Supreme Court and of this court. We also conclude that Balsys did not waive his right to invoke the privilege by completing a visa application in 1961. Accordingly, we vacate the district court's order.

BACKGROUND

Aloyzas Balsys is a resident alien currently living in Woodhaven, New York. He was born on February 6, 1913 in Lithuania and entered the United States on June 30, 1961. In his application for Immigrant Visa and Alien Registration, Balsys stated that between 1934 and 1940, he served in the Lithuanian army, and that between 1940 and 1944 he lived in Lithuania in hiding. As part of that application, Balsys swore that the information contained in his application for Immigrant Visa and Alien Registration was true. The application also included a declaration that Balsys understood that if he made any willfully false or misleading statements or concealed any material fact, and he entered the United States, he could be subject to criminal prosecution and/or deportation.

OSI is an arm of the Criminal Division of the United States Department of Justice. It was created to investigate and institute denaturalization and deportation proceedings against suspected Nazi war criminals. It claims to have evidence that Balsys assisted the Nazi forces occupying Lithuania during World War II and that he persecuted Jews and other civilians as a member of the Lithuanian Security Police. If Balsys did assist the Nazi forces and persecute Jews and other civilians, he might be eligible for deportation, pursuant to 8 U.S.C. §§ 1182(a)(3)(E), 1251(a)(4)(D), for persecuting persons because of their race, religion, national origin or political opinion, as well as pursuant to 8 U.S.C. §§ 1182(a)(6)(c)(i), 1251(a)(1)(A), for lying on his immigration application.

In furtherance of its investigation of Balsys's wartime activities, OSI issued an administrative subpoena commanding Balsys to give testimony and to

produce documents relating to his activities during the war and to his immigration to the United States. Balsys appeared at a deposition, and provided his name and address; he then asserted the Fifth Amendment privilege and refused to answer all other questions. These questions addressed, *inter alia*, his residence in Europe during the war, his association with Lithuanian police units and political groups, and his knowledge of and participation in the adverse treatment of Jews and others during the Nazi occupation of Lithuania. The only document he produced was his alien registration card. The United States brought suit in the district court to enforce the administrative subpoena.

Balsys argued to the district court that he is entitled to assert the privilege against self-incrimination because his answers could subject him to prosecution by the governments of Lithuania, Germany, and Israel. The government argued that Balsys had not demonstrated a real and substantial fear of foreign prosecution, that the privilege is inapplicable where the claimant fears prosecution by a foreign government, and that Balsys had waived his privilege.

In *United States v. Balsys*, 918 F. Supp. 588 (E.D.N.Y. 1996), the district court granted the petition for enforcement of the subpoena and ordered Balsys to testify. It held that Balsys does, in fact, face a real and substantial danger of foreign prosecution in Lithuania and in Israel because: (1) the responses OSI sought from Balsys could incriminate him under both Lithuania's statute punishing Nazis and Nazi collaborators for crimes committed against the Lithuanian people during World War II and Israel's law imposing the death penalty for those who committed crimes against the Jewish people, in countries

like Lithuania, during the Nazi regime; (2) Balsys's testimony would very likely be disclosed to Israel and Lithuania, since part of OSI's mandate is to "[m]aintain liaison with foreign prosecution, investigation and intelligence offices," Order of Att'y Gen. No. 851-79 (Sept. 4, 1979), since OSI has an agreement to collect and provide Lithuanian authorities with evidence on suspected Nazi collaborators, and since OSI has "shared similarly incriminative evidence with Israel in the past," *Balsys*, 918 F. Supp. at 596; and (3) if Balsys gives the answers OSI seeks, he could be deported to these countries.

The district court then considered whether Balsys could invoke the Fifth Amendment to avoid providing testimony and documents that might aid the potential foreign prosecutions. The court relied on *United States v. Lileikis*, 899 F. Supp. 802 (D. Mass. 1995), which stated:

> If a governmental interest in enforcing the organic laws of the United States is involved, and the United States has a legitimate need for a witness's testimony in furthering that interest, the privilege must yield if the sole basis for claiming its protections is the fact that a resident of the United States faces the likelihood of a foreign prosecution. It would be an unacceptable affront to the sovereignty of the United States if the operation of its laws could be stymied by the desire of a foreign government to prosecute the same witness.

Id. at 809. Following this reasoning, the district court held that Balsys could not invoke the privilege since the United States government sought his testimony out of a legitimate interest in a matter of do-

mestic law, namely, investigating Balsys's alleged lies on his application for entry:

> In declining to extend the Fifth Amendment privilege in the present case, the Court concludes that the fundamental purpose of the privilege is to protect individuals against governmental overreaching. Balsys seeks to assert the privilege as a means to thwart the enforcement of domestic law. This is contrary to the values the Fifth Amendment was intended to protect. Although Balsys may suffer harm as a result of the incriminating nature of the disclosure, the government has a valid purpose.
>
> . . .
>
> A contrary decision by this Court would allow individuals attempting to immigrate to the United States to misrepresent their personal histories and other relevant information in order to gain access to this country, leaving the government without recourse and seriously eroding domestic law enforcement. Accordingly, the Court concludes that Respondent is not entitled to invoke the Fifth Amendment privilege against compelled self-incrimination.

Balsys, 918 F. Supp. at 599-600.

Lastly, the district court held that even if Balsys were entitled to assert the privilege, he waived that privilege when he first applied for immigration. The court found that, in applying for a visa in 1961, Balsys initiated an immigration proceeding, that this proceeding remained open, and that the visa application and current OSI investigation were therefore parts of the same proceeding. Since voluntary statements

given on a subject during a single proceeding create an implied waiver with respect to that subject, the court found that Balsys had waived his Fifth Amendment privilege when, in his 1961 application, he answered questions concerning his activities during World War II. *See id.* at 600.

On appeal, Balsys challenges the district court's conclusion that he may not invoke the Fifth Amendment privilege to avoid giving evidence that could be used against him in a foreign prosecution, and denies that he waived the privilege when he completed the visa application before his entry to the United States. Neither party challenges the finding that Balsys has a real and substantial danger of prosecution by Lithuania and Israel, and an uncertain risk of prosecution by Germany.

DISCUSSION

I. The Privilege Against Self-Incrimination and the Fear of Foreign Prosecution

The Fifth Amendment provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend V. Resident aliens, like Balsys, have the same rights under the Fifth Amendment as citizens, *see Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 & n.5 (1953), and thus may invoke the privilege to the same extent as citizens. The privilege against self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory," in which the witness reasonably believes that the information sought, or the evidence discovered as a result of that information, could be used against him in a subsequent criminal prosecution. *Kastigar v.*

United States, 406 U.S. 441, 444-45 (1972); *see also Hoffman v. United States*, 341 U.S. 479, 486 (1951).

The deposition at which Balsys asserted the privilege was part of an investigation into whether Balsys is deportable. Since a deportation proceeding is a civil action and not a criminal prosecution, *see INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984), Balsys does not have a Fifth Amendment right to refuse to answer questions posed to him for fear that such information might be used to deport him. He would, nevertheless, clearly have a right to refuse to answer the questions if the information could be used against him in a criminal case in the United States. Balsys does not claim to be at risk of such domestic criminal prosecution. Instead, he asserts (and the government does not deny on appeal) that he has a real and substantial fear of prosecution by Lithuania and Israel. The language of the Fifth Amendment makes no distinction between self-incrimination in domestic and in foreign prosecutions. The privilege would therefore seem to apply to Balsys. The government nevertheless argues that the Fifth Amendment privilege does not protect against self-incrimination in foreign criminal trials. And so the question facing this court is whether fear of foreign prosecution gives Balsys the right to refuse to answer questions in a domestic deportation proceeding.

A. *Direct Case Law*

In answering this question, we have no explicit guidance from either the Supreme Court or from this court. Although the issue was before the Supreme Court in *Zicarelli v. New Jersey State Comm'n of*

Investigation, 406 U.S. 472 (1972),[1] the Court held that since no "real and substantial" risk of foreign prosecution existed in that case, it was unnecessary to decide the question. See id. at 478-81, 92 S.Ct. at 1674-76.[2] Since *Zicarelli*, and until this case, this court has never had to reach the issue, because each of the claimants advancing the argument lacked the real and substantial fear of foreign prosecution required by the Supreme Court. *See, e.g., United States v. Chevrier (In re Grand Jury Proceedings)*, 748 F.2d 100, 104-05 (2d Cir. 1984); *United States v.*

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[1] The Supreme Court had previously granted certiorari in a case in which a circuit court had held that a witness has no right to invoke the privilege to avoid incriminating himself in a foreign prosecution. But the court never ruled on this issue. *See Parker v. United States*, 397 U.S. 96, 96 (1970). Instead, it vacated and remanded the case to the Tenth Circuit with instructions to dismiss the appeal as moot. *Id.*

[2] In *Araneta v. United States*, 478 U.S. 1301 (1986), responding to an application for a stay of a contempt order pending certiorari, Chief Justice Burger, acting as Circuit Justice, briefly addressed the issue. He granted the stay on the ground that "there is a 'fair prospect' that a majority of this Court will decide the issue in favor of the applicants." *Id.* at 1304. Since the petition for a writ of certiorari was later denied, the stay was lifted, and the court did not consider the question. *See Araneta v. United States*, 479 U.S. 924 (1986).

Before the petition for certiorari in Araneta was denied, Justice Stevens, following the Chief Justice, also stayed the enforcement of a contempt order entered when a witness refused to testify at a deposition despite a grant of immunity because he feared that the testimony could be used against him in a criminal proceeding by the Soviet Union. *See Mikutaitis v. United States*, 478 U.S. 1306, 1308-09 (1986). On the same day certiorari was denied in *Araneta*, the Court vacated the stay entered by Justice Stevens. *See Mikutaitis v. United States*, 479 U.S. 911 (1986).

Gilboe, (In re Gilboe), 699 F.2d 71, 74-75 (2d Cir. 1983); *United States v. Flanagan (In re Flanagan)*, 691 F.2d 116, 121-22 (2d Cir. 1982).

Three other circuits have considered whether the Fifth Amendment privilege applies to fear of incrimination in foreign countries, and they have come to divergent conclusions.

In *United States v. (Under Seal) (Araneta)*, 794 F.2d 920 (4th Cir. 1986), the Fourth Circuit held that the Fifth Amendment does not protect a witness facing a substantial risk of foreign prosecution from compelled self-incrimination. It reasoned that when the Fifth Amendment applied only to the federal government, and not to the states, the Supreme Court had held that the amendment did not forbid the federal government from compelling testimony that would incriminate a witness under state law or forbid a state government from compelling testimony that would incriminate the witness under federal law. Since "[o]nly when the Fifth Amendment was held applicable to the states was the privilege held to protect a witness in state or federal court from incriminating himself under either federal or state law," the court concluded "that the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination." *Araneta*, 794 F.2d at 926 (citation omitted). The Fourth Circuit has since reaffirmed this holding in *United States v. (Under Seal)*, 807 F.2d 374, 375-76 (4th Cir. 1986) (per curiam).

The Tenth Circuit also held in a brief opinion that the Fifth Amendment does not protect against self-incrimination for acts made criminal by the laws of a foreign nation. *See In re Parker*, 411 F.2d 1067 (10th

Cir. 1969), *vacated as moot sub nom., Parker v. United States*, 397 U.S. 96 (1970).[3] The court stated:

> The ideology of some nations considers failure itself to be a crime and could provide punishment for the failure, apprehension, or admission of a traitorous saboteur acting for such a nation within the United States. In such a case the words "privilege against self-incrimination," engraved in our history and law as they are, may turn sour when triggered by the law of a foreign nation.

Id. at 1070 (footnote omitted).

The Eleventh Circuit considered the issue in a case with facts very similar to those in the case before us. *See United States v. Gecas*, 50 F.3d 1549 (11th Cir. 1995), *reh'g en banc granted, op. vacated*, 81 F.3d 1032 (11th Cir. 1996). Vytautas Gecas invoked the privilege during a deposition by OSI that was part of a investigation into whether Gecas, a resident alien, lied on his visa application in 1962 about his activities in Lithuania during World War II. Reasoning that the Fifth Amendment has multiple purposes, which include protecting individual dignity as well as preventing overzealous prosecution, a panel of the Eleventh Circuit permitted Gecas to invoke the privilege. Allowing the privilege where the fear of foreign prosecution is real and substantial promotes, the

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[3] Although the Tenth Circuit opinion in *Parker* was vacated, it remains persuasive authority to the Tenth Circuit. *See, e.g., Nigro v. United States (In re Grand Jury Proceeding 82-2)*, 705 F.2d 1224, 1227 (10th Cir. 1982). We consider the decision in this light. *See United States v. Gecas*, 50 F.3d 1549, 1563 n.22 (11th Cir. 1995), *reh'g en banc granted, op. vacated*, 81 F.3d 1032 (11th Cir. 1996).

court concluded, an appropriate balance between these purposes and the important government interest in domestic law enforcement. *See id.* at 1564-65.

A number of district courts, in this circuit and elsewhere, have also considered the question that the court faces today. In 1972, after the Supreme Court in *Zicarelli* had indicated that the issue remained open, Chief Judge Newman of this court, then a district court judge for the District of Connecticut, held that, when a witness has a reasonable fear of foreign prosecution, he can invoke the privilege against self-incrimination, despite a grant of use immunity. *See In re Cardassi*, 351 F. Supp. 1080, 1086 (D. Conn. 1972). In reaching that conclusion, Judge Newman relied heavily on the earlier Supreme Court opinion in *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964). *See Cardassi*, 351 F. Supp. at 1084-86. His ruling was not appealed. Another member of this court also addressed this issue as a district court judge. In *In re Flanagan*, 533 F. Supp. 957 (E.D.N.Y.), *rev'd on other grounds*, 691 F.2d 116 (2d Cir. 1982), Judge McLaughlin, then of the Eastern District of New York, found that Martin Flanagan had a real and substantial fear of being prosecuted in the Republic of Ireland or in Northern Ireland for being a member of the Irish Republican Army, and went on to hold that the privilege could be invoked in the face of such a fear. *See id.* at 962-66. This court, however, held that the district court had erred in finding a real and substantial fear of foreign prosecution. We therefore reversed the district court without reaching the issue of the applicability of the privilege. *See Flanagan*, 691 F.2d at 121-22.

District courts in other circuits have also found the privilege to extend to fear of foreign prosecution.

See, e.g., Moses v. Allard (In re Moses), 779 F. Supp. 857, 870-83 (E.D. Mich. 1991) (refusing in a domestic bankruptcy proceeding to compel the testimony of a debtor who feared prosecution in Switzerland); *Yves Farms, Inc. v. Rickett*, 659 F. Supp. 932, 939-41 (M.D. Ga. 1987) (holding that a foreign citizen was entitled to invoke the Fifth Amendment privilege against private-party defendants seeking testimony on a collateral issue); *Mishima v. United States*, 507 F. Supp. 131, 135 (D.Alaska 1981) (relying on the analysis of English common law in *Murphy* to conclude that the privilege could be invoked where a real fear of foreign prosecution exists). And a number of district courts have found the privilege applicable in the particular context of OSI investigations. *See, e.g., United States v. Kirsteins*, No: 87-CV-964, 1989 WL 49796, at *10 (N.D.N.Y. May 10, 1989) (noting an earlier decision to allow the witness to invoke the privilege); *United States v. Trucis*, 89 F.R.D. 671, 673 (E.D. Pa. 1981) (Pollak, J.) (relying on Judge Newman's discussion in *Cardassi*). But other district courts have refused to allow the privilege to be invoked against questioning by OSI. *See, e.g., Lileikis*, 899 F. Supp. at 809 (holding that the privilege cannot be asserted if there is a governmental interest in enforcing domestic law and the witness's testimony furthers that interest).

Although the Supreme Court has not squarely addressed the issue faced by this court today, the Court has considered an analogous and related issue: whether "one jurisdiction in our federal structure may compel a witness to give testimony which might incriminate him under the laws of another jurisdiction." *Murphy*, 378 U.S. at 54. The Court's answer to this question guides us in two ways. First, like the

Supreme Court in *Murphy*, we will begin by considering the question in the light of the purposes of the Fifth Amendment, and then in the light of Supreme Court cases and of English common law. Second, the *Murphy* decision, in and of itself, provides considerable support for the holding that the Fifth Amendment protects Balsys from being compelled to testify.

B. *The Purposes of the Fifth Amendment*

Although the district court noted that the Fifth Amendment has a "role in preserving an individual's privacy and dignity," it determined "that the fundamental purpose of the privilege [against self-incrimination] is to protect individuals against governmental overreaching." *Balsys*, 918 F. Supp. at 598-99. The court went on to conclude that, since Balsys asserted the privilege in order to "thwart the enforcement of domestic law," and since "the government has a valid purpose," and there is no evidence of "malicious" or "'overzealous prosecution,'" allowing Balsys to assert the privilege would undermine the values the Fifth Amendment was intended to protect. *Id.* at 599.

We disagree.

The origins and history of the Fifth Amendment are complex and controversial. *See, e.g.*, Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (1968); R.H. Helmholz, *Origins of the Privilege Against Self-incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. Rev. 962 (1990); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047 (1994); John H. Wigmore, *The Privilege Against Self-Crimination; Its History*, 15 Harv. L. Rev. 610 (1902).

And its purposes are myriad and difficult to divine. *See Murphy*, 378 U.S. at 56-57 n.5; Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 857-58 ("The Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights. From the beginning it lacked an easily identifiable rationale. . . . Today, things are no better: the clause continues to confound and confuse.").

Nevertheless, the Supreme Court has stated that its purposes include:

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

Murphy, 378 U.S. at 55, 84 S.Ct. at 1596 (citations and internal quotation marks omitted). We are told, therefore, that the Fifth Amendment serves three categories of purposes: it advances individual integ-

rity and privacy, it protects against the state's pursuit of its goals by excessive means, and it promotes the systemic values of our method of criminal justice. Rather than attempt to determine a single cardinal purpose of the Fifth Amendment and consider the question before us only in relation to that purpose, as the district court essentially did, we are bound to recognize the multiple values that the Supreme Court has found the privilege against self-incrimination to serve, and to consider whether allowing those who have reasonable fear of foreign prosecution to invoke the privilege "promotes or defeats [these] policies and purposes." *Id.*[4]

1. *Individual Dignity and Privacy Values*

Permitting a witness to invoke the Fifth Amendment to avoid incriminating himself in a foreign criminal case works to protect the dignity and privacy of the individual every bit as much as allowing the privilege in cases where the fear is of domestic prosecution. The Supreme Court has repeatedly emphasized the need to avoid imposing the "cruel trilemma" of self-accusation, perjury, or contempt, *see, e.g.*, *Pennsylvania v. Muniz*, 496 U.S. 582, 595-97 (1990); *South Dakota v. Neville*, 459 U.S. 553, 561-64

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[4] [T]he privilege against self-incrimination represents many fundamental values and aspirations. . . . It will not do, therefore, to assign one isolated policy to the privilege and then to argue that since "the" policy may not be furthered measurably by applying the privilege [in a particular way], it follows that the privilege should not be so applied.

Murphy, 378 U.S. at 56-57 n. 5 (criticizing Wigmore's rejection of the applicability of the privilege where the prosecution is foreign).

(1983), and this trilemma is no less cruel nor any less imposed by a government within the United States merely because the testimony is ultimately used by a foreign nation. Nor is the threat to the "the human personality" and privacy any less serious simply because the compulsion serves the purposes of a foreign government. Finally, the privilege protects the innocent and better ensures the reliability of the testimony the United States seeks to compel regardless of whether the witness from whom the information is sought fears foreign or domestic prosecution, since self-incriminating statements are no more reliable in either case.

2. *Values of the American Criminal Justice System*

The systemic policies of American criminal justice that underly the Fifth Amendment are neither promoted nor inhibited by allowing the privilege to be invoked in cases of fear of foreign prosecution. Although we value an accusatorial system, a "fair state-individual balance" in criminal trials, and trial evidence of the highest reliability, *our* practice of these values is unaffected one way or the other when a witness fears foreign prosecution. This factor is, therefore, of no real significance in cases of this sort.

3. *Values of Preventing Governmental Overreaching*

The question of how applying the privilege in cases of fear of foreign prosecution affects the Fifth Amendment's purpose of avoiding governmental overreaching is more complicated. The district court reasoned that since Balsys faces no domestic prosecution, "there is no incentive for the government to elicit self-incriminating statements from Balsys by 'inhumane treatment and abuses.'" *Balsys*, 918 F. Supp.

at 599 (quoting *Murphy*, 378 U.S. at 55). Admittedly, there is less of a motive for a government to treat a witness inhumanely in order to extract admissions when that same government is not seeking to prosecute the witness. "Conviction hunger"[5] seems unlikely when the prosecution does not intend to eat. We believe, however, that the district court underestimated the danger that exists where the fear is of prosecution in foreign lands.

First, a domestic government's interest in extracting admissions in aid of foreign prosecutions is more analogous to a domestic jurisdiction's interest in the criminal prosecution of a witness by another domestic jurisdiction than it is to the situation in which the "extracting" government has no interest in prosecution at all. In *Murphy*, the Court suggested that the purpose of avoiding governmental abuse was best served by preventing states and the federal government from compelling testimony that might incriminate the witness in a court of another jurisdiction. This is because there is frequently a "cooperative federalism" between the several states and the nation, as a result of which the federal and state governments wage "a united front against many types of criminal activity." *Murphy*, 378 U.S. at 56.

International collaboration in criminal prosecutions has intensified admirably in recent years. *See New MLAT Treaties Increase DOJ's Reach*, 4 No. 7 DOJ Alert 7, April 18, 1994, (discussing rise in United

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[5] This is the label Wigmore used to describe the motive of a government to engage in "inhumane treatment of persons from whom information is desired." *See Murphy*, 378 U.S. at 56 n.5 (citing 8 J. Wigmore, Evidence § 2251, at 317 (McNaughton rev. ed. 1961)).

States cooperation with foreign nations to produce criminal evidence); Ethan A. Nadelman, *Cops Across Borders: the Internationalization of U.S. Criminal Law Enforcement* (1993); M. Cherif Bassiouni, *Policy Considerations on Inter-State Cooperation in Criminal Matters*, 4 Pace Y.B. Int'l L. 123, 130 (1992) (discussing the increase in cooperation among national and international police agencies since 1960's); Dominic Bencivenga, *International Antitrust Bilateral Pacts Seen As Crucial to Enforcement*, N.Y.L.J, December 12, 1996 at 5; *U.S. Mutual Legal Assistance Treaties Continue Proliferating*, Money Laundering Alert, 1996 WL 8687221 (May 1, 1996); Bruce Zagaris, *International Criminal and Enforcement Cooperation in the Americas in the Wake of Integration*, 3 Sw. J.L. & Trade Am. 1 (1996) (reviewing criminal enforcement cooperation mechanisms in the Americas). And what might be called "cooperative internationalism" has now begun to parallel the "cooperative federalism" described in *Murphy*. This eminently desirable development leads to the conclusion that, since the United States *does* have a significant stake in many foreign criminal cases, we can best avoid governmental abuse by allowing witnesses to avoid being compelled to answer questions posed by the government at home for fear of incriminating themselves abroad.

Second, as this case demonstrates, there is considerable correlation between the cases in which a witness is most likely to be able to demonstrate a real and substantial fear of foreign prosecution and the cases in which the purpose of preventing government overreaching would best be served by permitting the privilege. The United States government has manifested a substantial interest in the success of Bal-

sys's foreign prosecution, an interest that makes that foreign prosecution significantly more likely. For example, according to the district court—and neither party has challenged its analysis in this regard—Balsys has a real and substantial fear of foreign prosecution in large part precisely because (1) "OSI was created for the sole purpose of investigating and gathering evidence of alleged Nazi collaborators residing in the United States illegally, and taking legal action to denaturalize, deport or prosecute them," (2) "OSI has entered into an agreement to provide evidence that it has gathered on suspected Nazi collaborators to Lithuania," and (3) OSI has exchanged incriminating evidence on suspected Nazi collaborators with Israel on past occasions. *See Balsys*, 918 F. Supp. at 595-97 (citing the order of the Attorney General establishing OSI, Order of Att'y Gen. No. 851-79 (Sept. 4, 1979), and a Memorandum of Understanding Between the United States Department of Justice and the Office of the Procurator General of the Republic of Lithuania Concerning Cooperation in the Pursuit of War Criminals, August 3, 1992, U.S.-Lithuania); *see also Gecas*, 50 F.3d at 1557-61 (concluding that Gecas had a real and substantial fear of foreign prosecution for substantially the same reasons).

In the presence of such facts, it would be odd indeed to suggest that the United States government does not care about foreign prosecutions and hence that allowing witnesses to invoke the privilege does not discourage governmental overreaching. Indeed, it is precisely in cases in which the United States' interest is strongest that the evidence will most probably be shared. In the same cases, in part because of the sharing of evidence, the witness will most likely be

able to show a real fear of foreign prosecution. There is thus a strong correlation between the cases in which the government has an interest and the cases in which the witness will be able to use the privilege. It follows that permitting the privilege in such cases will help curb any tendency by the United States to take abusive measures just as it does in cases in which domestic prosecution is feared. For these reasons, we reject the district court's argument that allowing Balsys the privilege would not further the Fifth Amendment purpose of avoiding governmental overreaching.

The district court also erred when, following *Lileikis* it suggested that it is relevant to the application of the privilege that "[t]here is no indication that the government's motive is malicious, or that the government is engaging in overzealous prosecution." *Balsys*, 918 F. Supp. at 599. The *Lileikis* court held that as long as the United States has a legitimate need for a witness's testimony to further a governmental interest in enforcing domestic law, and there is no evidence of improper motivation, the privilege must yield. *Lileikis*, 899 F. Supp. at 808-09. This holding, however, is contrary to both the purposes and the structure of the protection provided by the Fifth Amendment.

The exact same argument—if it were valid—would apply to invocations of the privilege in cases of fear of domestic prosecution. In almost all situations in which a witness in a civil proceeding claims the privilege, there exists a significant domestic law interest in obtaining the information. And yet the privilege perdures. Similarly, it is rare in such cases that one can show either overzealous prosecution or improper motivation. But no such showing is required.

The privilege applies in such instances because the Fifth Amendment is fundamentally preventative. It prevents the government from using compelled testimony in the class of the cases—criminal prosecutions—in which the government's interest in the information might most tempt it to abuse witnesses. It does this at the cost of possibly limiting information gathering in other contexts, including civil cases. The point of the privilege is to *preempt* government abuse, rather than to seek to deter abuse by punishing it after it has occurred.

The question is not, therefore, as *Lileikis* suggests, whether the government can state some legitimate interest in the testimony it seeks, or whether governmental overreaching can be shown. It is rather whether cases involving fear of foreign prosecution—as a class—involve circumstances in which the application of the Fifth Amendment would preempt abuse and thereby promote constitutional goals. More directly, the question is whether, in this respect, cases involving fear of foreign prosecution differ significantly from cases involving domestic prosecutions. As we have noted, the United States will frequently have the same opportunity and the same temptations when a witness faces prosecution abroad as in cases involving fear of prosecution by another domestic jurisdiction. It follows that applying the privilege in both sets of cases achieves the same functions at the same costs. In both contexts, the Fifth Amendment inhibits the pursuit of government goals—in spite of their legitimacy and importance—in order to deny the government an inducement to use inappropriate methods to achieve those ends.

C. *The Supreme Court, English Common Law, and the Privilege Against Self-Incrimination*

In *United States v. Murdock*, 284 U.S. 141 (1931), the Supreme Court held that the federal government could compel a witness to give testimony that might incriminate him under state law. In support of this holding the Court cited English common law, stating "[t]he English rule of evidence against compulsory self-incrimination, on which historically, that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country." *Id.* at 149. Thirty-three years later (on the very same day that the Court held in *Malloy v. Hogan*, 378 U.S. 1, 3 (1964), that the Fifth Amendment privilege against self-incrimination applies to the States through the Fourteenth Amendment), the Court in *Murphy* rejected the basis, the reasoning, and the holding of *Murdock*.

In *Murphy*, the Court held that the privilege against self-incrimination protects a witness in one domestic jurisdiction against being compelled to give testimony that could be used to convict him in another domestic jurisdiction. Part of the Court's justification for this rejection of the *Murdock* rule was that the *Murdock* Court had incorrectly stated the relevant English common law rule. The *Murdock* Court had asserted that the English common law rule could be found in *King of the Two Sicilies v. Willcox*, 1 Sim. (N.S.) 301, 61 Eng. Rep. 116 (Ch. 1851). The *Murphy* Court concluded instead that *United States of America v. McRae*, L.R., 3 Ch. App. 79 (Ch. App. 1867), which held that *where a witness is under threat of foreign prosecution the privilege applies as much as where the witness is exposed to that threat*

under English law, reflected "the settled 'English rule' regarding self-incrimination under foreign law." *Murphy*, 378 U.S. at 63. Thus, the *Murphy* Court rejected the conclusion that the "only danger to be considered is one arising within the same jurisdiction and under the same sovereignty." and ultimately "accept[ed] as correct the construction given the privilege by the English courts" namely, that the privilege may be invoked by witnesses attempting to avoid incriminating themselves abroad. *Murphy*, 378 U.S. at 68, 77-78 (internal quotation marks omitted).[6]

The Supreme Court's statement and acceptance of the English common law rule suggests that the Court has endorsed the proposition we accept today, that a witness may invoke the Fifth Amendment out of fear of a foreign prosecution. *See Trucis*, 89 F.R.D. at 673; *Mishima*, 507 F. Supp. at 134-35; *Cardassi*, 351 F. Supp. at 1085. *But see Parker*, 411 F.2d at 1070 (stating that the Supreme Court relied on English common law regarding foreign prosecutions only as an

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[6] It is evident from this analysis that the Supreme Court in *Murphy* believed *Murdock* to be incorrect *when it was written*. It did not simply find that *Murdock* became inapplicable in the light of subsequent legal developments. We therefore reject the Fourth Circuit's conclusion that the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment. According to the Fourth Circuit's reasoning, *Murphy* would not have held the privilege to protect a witness from being compelled to testify in one domestic jurisdiction where the testimony could incriminate him in another if *Malloy* had not made the Fifth Amendment applicable to the states through the Fourteenth Amendment on the same day. *See Araneta*, 794 F.2d at 926. But the opinion in *Murphy* expressly (albeit in dicta) forecloses any such conclusion.

"argumentative analogy" to the relationship between the federal government and the states). Although the discussion of English common law in *Murphy* does not decide the case before us, as demonstrated by the fact that the Court considered the question an open one in *Zicarelli*, it does provide significant support for our conclusion. *See Araneta v. United States*, 478 U.S. 1301, 1303-04 (1986) (Chief Justice Burger acting as Circuit Justice in granting stay of contempt order) ("*Murphy v. Waterfront Comm'n of New York Harbor* contains dictum which, carried to its logical conclusion, would support" a ruling that "the privilege against self-incrimination protects a witness from being compelled to give testimony that may later be used against him in a foreign prosecution.") (citation omitted).[7]

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[7] Some commentators and courts have suggested that the English common law rule was less certain than *Murphy* indicated. *See Araneta*, 794 F.2d at 927; Randall D. Gyunn, Note, *The Reach of the Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used in a Foreign Country's Court*, 69 Va. L. Rev. 875, 893 (1983). Even assuming arguendo that this objection has merit, it is for the Supreme Court and not us to assess its significance. Moreover, the Supreme Court plainly recognized, in both *Murphy* and *Murdock*, that there is a strong analogy between a domestic jurisdiction compelling testimony that may be used by another domestic jurisdiction and a domestic jurisdiction compelling testimony that may be used by a foreign jurisdiction. *See Murphy*, 378 U.S. at 57-72, 77-78; *Murdock*, 284 U.S. at 149. Nothing about the Court's alleged error undermines that analogy. And there is no doubt that the Supreme Court continues to abide by the rule laid out in *Murphy* that the privilege may be invoked against a domestic jurisdiction seeking testimony that might incriminate in another domestic jurisdiction. Consequently, even if the Court were to retreat from its view on English law, it does not follow that it would fail to apply the

D. *Application of the Privilege and United States Enforcement of Domestic Law*

The district court viewed the potential effect of the privilege on domestic law enforcement as the primary obstacle to granting the privilege to those in Balsys's position. *See Balsys*, 918 F. Supp. at 599 ("[T]o allow Balsys to invoke the privilege would unreasonably impinge on the government's ability to monitor and verify immigration and visa applications."). Other courts and commentators that have denied such witnesses the privilege have been similarly concerned that granting the privilege would allow the priorities of foreign prosecutions to inhibit domestic law enforcement. *See, e.g., Araneta*, 794 F.2d at 926 ("It would be intolerable to require the United States to forego evidence legitimately within its reach solely because a foreign power could deploy this evidence in a fashion not permitted within this country."); *Lileikis*, 899 F. Supp. at 809 (stating that if the United States has a legitimate need for a witness's testimony, "[i]t would be an unacceptable affront to the sovereignty of the United States if the operation of its laws could be stymied by the desire of a foreign government to prosecute the same witness"); *Parker*, 411 F.2d at 1070; Diego A. Rotztain, Note, *The Fifth Amendment Privilege Against Self-Incrimination*

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privilege in cases of fear of foreign prosecution. Since the *Murphy* rule persists, and since the Supreme Court has indicated that the issue before us is analogous to the issue decided in *Murphy*, it follows that, regardless of what the English rule on witnesses who face foreign prosecution in fact was, the *Murphy* rule, by itself, provides significant support for the conclusion that the privilege against self-incrimination may be invoked to avoid incriminating oneself in a foreign criminal case.

and Fear of Foreign Prosecution, 96 Colum. L. Rev. 1940, 1964 (1996).

This objection is significant because it contrasts the effects on domestic law enforcement of granting the privilege to those who fear criminal charges abroad with the effects of granting it to witnesses who fear prosecution at home. When a witness refuses to answer questions because he is afraid of domestic prosecution, the government is able to compel the testimony by offering the witness immunity from the use either of the testimony or of its fruits in a subsequent domestic criminal prosecution. *See Kastigar*, 406 U.S. at 449, 459. This immunity is enforced by the courts. Once a defendant establishes that he has testified under a grant of immunity, the court will exclude evidence in subsequent criminal proceedings unless the government proves that the evidence it proposes to use comes from a legitimate source independent of the compelled testimony. *See id.* at 460. Where a witness fears foreign criminal proceedings, under current law, the United States cannot grant effective immunity since our courts cannot ensure the exclusion of evidence from prosecutions abroad. Because allowing the privilege in the latter case allegedly deprives the government of the means of compelling testimony, the result is said to be an unacceptable encroachment on the government's law enforcement efforts.

We find the strength of this objection to be exaggerated, and we conclude that it does not justify denying those who fear foreign prosecution the right to use the privilege.

The fact that allowing the privilege has costs for domestic law enforcement is not by itself a constitutional argument for disallowing the privilege. *See*

Cardassi, 351 F. Supp. at 1086 ("Of course, a constitutional privilege does not disappear, nor even lose its normal vitality, simply because its use may hinder law enforcement activities. That is a consequence of nearly all the protections of the Bill of Rights, and a consequence that was originally and ever since deemed justified by the need to protect individual rights.").

> The effective enforcement of a well-designed penal code is of course indispensable for social security. But the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed.

Feldman v. United States, 322 U.S. 487, 489, 64 S.Ct. 1082, 1083, 88 L.Ed. 1408 (1944). It is the duty of the courts to enforce constitutional protections despite their costs.

It might nevertheless be argued that in deciding whether a constitutional right exists, a court may consider the effect that such a finding will have on legitimate government needs. For example, it could be said that, if the application of the privilege against self-incrimination that we consider today has a much greater negative effect on domestic law enforcement than does the traditional application of the privilege, this disparity might itself be relevant to what the words of the Framers should be taken to mean. The premise of this argument, however—that the interpretation of the privilege that we accept today would have a significantly greater adverse effect on the United States's ability to pursue domestic

law enforcement goals than does its traditional application—is dubious.

1. *The Conflict Rarely Arises*[8]

In the first place, the circumstances giving rise to application of the privilege in cases involving foreign prosecutions rarely occur. Since the Supreme Court refused to consider the constitutional question twenty-five years ago in *Zicarelli*—finding that the witness had not established a real and substantial fear of foreign prosecution—only a handful of witnesses have managed to demonstrate such a fear. *See Gecas*, 50 F.3d at 1556-62; *Araneta*, 794 F.2d at 923-25; *United States v. Ragauskas*, No. 94 C. 2325, 1995 WL 86640, at *3-4 (N.D. Ill. 1995); *Moses*, 779 F. Supp. at 861-870; *Trucis*, 89 F.R.D. at 673; *Mishima*, 507 F. Supp. at 132-33; *Cardassi*, 351 F.Supp. at 1083-84. In most cases, courts have found that the danger is "remote and speculative" and, hence, insufficient to justify the application of the privilege. *See, e.g., Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1064-65 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990); *United States v. Joudis*, 800 F.2d 159, 163-64 (7th Cir. 1986); *In re President's Comm'n on Organized Crime*, 763 F.2d 1191, 1198-99 (11th Cir. 1985); *Chevrier*, 748 F.2d at 104-05 (2d Cir. 1984); *Gilboe*, 699 F.2d at 75-78; *Flanagan*, 691 F.2d at 121-24; *Nigro*, 705 F.2d at 1226-28; *In re Baird*, 668

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[8] Judge Meskill in his opinion concurring in the result disassociates himself with this section because he deems it unnecessary to a resolution of this appeal. He is, of course, quite right that this section would not be needed if the appeal were to be resolved in the way that he suggests. This section is not superfluous, however, given the grounds of decision adopted by the majority.

F.2d 432, 434 (8th Cir. 1982); *United States v. Yanagita*, 552 F.2d 940, 946-47 (2d Cir. 1977); *In re Tierney*, 465 F.2d 806, 811-12 (5th Cir. 1972).

This is likely to continue to be the case, as it is difficult to establish a real and substantial fear of criminal prosecution abroad. For example, one important factor in determining whether a witness has a real and substantial fear of foreign prosecution is whether, by extradition or deportation, he would likely "be forced to enter a country disposed to prosecute him." *Gecas*, 50 F.3d at 1560; *see also Balsys*, 918 F. Supp. at 596; *Flanagan*, 691 F.2d at 121. And few witnesses are, in fact, subject to either deportation or extradition.

Only aliens may be deported. See 8 U.S.C. § 1227.[9] And extradition generally requires the existence of an authorizing treaty. *See United States v. Alvarez-Machain*, 504 U.S. 655, 664 (1992); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936). Moreover, even if an extradition treaty exists linking the United States and the country in which a witness fears prosecution, the witness can be extradited to that country only for acts that would also be criminal in the United States.[10] For these reasons,

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[9] It is also possible for the United States to bring a denaturalization proceeding to revoke the citizenship of a witness under some circumstances, such as where the citizenship was illegally procured or procured by concealment of a material fact. *See* 8 U.S.C. § 1451. After a witness is denaturalized, he may be deported as an alien. This process, however, generally takes much longer than extradition.

[10] Traditionally, extradition treaties included a list of specific crimes for which extradition was provided. More recent extradition treaties negotiated by the United States require that the alleged crime for which extradition is requested be a crime in both countries *See* Marian Nash, *Modernization of Extradition Treaties*, 86 Am. J. Int'l L. 547, 547 (1992); M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 320, 324-27 (2d ed. 1987); *LoDuca v. United States*, 93 F.3d 1100, 1111-12 (2d Cir.), cert. denied, 117 S.Ct. 508 (1996).

It follows that the fear expressed in *Parker* that strange foreign criminal laws could result in denying the United States access to testimony, *see Parker*, 411 F.2d at 1070, is unfounded since in such cases it is very unlikely that the witness would ever be forcibly subject to the jurisdiction threatening to prosecute him. *See* Moshe M. Sukenik, Note, *Testimony Incriminating Under the Laws of a Foreign Country—Is There a Right to Remain Silent?*, 11 N.Y.U. J. Int'l L. & Pol. 359, 369 (1978).

and because of other barriers to showing a real and substantial fear of foreign prosecution, the class of witnesses who are likely to be eligible for the privilege under the interpretation Balsys advocates is very limited.

In the second place, even where a real and substantial fear of prosecution is established, allowing the witness to invoke the privilege would often have little effect on domestic law enforcement. A witness may only use the privilege in response to questions the answers to which might "in themselves support a conviction" or "furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). He may not maintain a general silence. Since the United States's interests in domestic law enforcement concern primarily *domestic* activities and foreign prosecutions concern primarily *foreign* activities, when what a witness fears is foreign prosecution, the information sought by the United States will usually not fall within the scope of the silence that

the Fifth Amendment allows to that witness. *See Cardassi*, 351 F. Supp. at 1086.

In the third place, since an adverse inference may be drawn in civil cases when a witness invokes the privilege, that very invocation often aids the government's case at the same time that it deprives the government of the testimony it sought. In *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Supreme Court made clear that while the Fifth Amendment precludes the drawing of adverse inferences against defendants in criminal cases, it "does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Id.* at 318. "This is so even though, as in *Baxter*, the government is a party to the action and would benefit from the drawing of the inference." *LiButti v. United States*, 107 F.3d 110, 121 (2d Cir. 1997) (citing *United States v. Ianniello*, 824 F.2d 203, 208 (2d Cir. 1987)).

It follows, for example, that since a deportation hearing is a civil proceeding, *see Lopez-Mendoza*, 468 U.S. at 1038-39, a resident alien, like Balsys, who refuses to answer questions that might incriminate him abroad takes a chance that he will create a negative inference that may be used in conjunction with other evidence to deport him. Invoking the privilege in the face of incriminating questions is probably not, *by itself*, sufficient to justify depriving a person of an important liberty interest. *See Superintendent v. Hill*, 472 U.S. 445, 455 (1985). And freedom from deportation is such an interest. *See United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927). But if there is other evidence, the witness's silence may contribute to a decision to deport the alien. *See United States v. Stelmokas*, 100

F.3d 302, 311 (3d Cir.1996) (stating that adverse inferences could be drawn in a denaturalization proceeding against an alleged Nazi collaborator from fact that he invoked his privilege against self-incrimination "as long as there was independent evidence to support the negative inferences beyond the invocation of the privilege against self-incrimination"), *cert. denied*, 1997 WL 221308 (U.S. May 27, 1997). The possibility of drawing adverse inferences, thus substantially reduces the effects on government law enforcement efforts of applying the privilege to those who fear incriminating themselves in foreign prosecutions.

Finally, the witness's testimony may not be the only source of the information the government seeks. And although the government might prefer to obtain the information directly from the witness, it may often be able to achieve its law enforcement goals by relying entirely on other sources of evidence.

2. *Parallels to Immunity Statutes May Be Enacted*

Nevertheless, we assume that there do exist a number of cases in which the testimony sought by the government will be (a) within the scope of the privilege possessed by a witness (b) who genuinely fears prosecution abroad, (c) in circumstances in which the witness's failure to testify would affect the government's interests adversely. There are domestic legal areas in which the United States has an important interest in a witness's testimony about events that occurred overseas. The present case provides the most common example. When a resident alien is alleged to have lied about criminal activities in which he engaged in a foreign country, the United States may have a strong interest in excluding him from the United States, and the other country may have

a strong interest in prosecuting him.[11] *See, e.g.*, *Balsys*, 918 F. Supp. at 592-97; *Gecas*, 50 F.3d at 1553-62. And even with a negative inference against him, the government may not have sufficient evidence to deport the witness without his own testimony.

We do not doubt, therefore, that applying the privilege to those who fear foreign prosecution will have some constraining effect—albeit less than the government suggests—on the government's pursuit of testimony. Even in such cases, however, the government can do much to minimize the costs to its law enforcement efforts, enough, indeed, so that those costs become analogous to those that occur in domestic prosecutions. For methods may exist by which the United States can constitutionally bypass the privilege either by eliminating the likelihood that the witness will be sent to the jurisdiction that would prosecute him, or by granting some form of constructive immunity to the witness.

As we have indicated previously, in cases involving fear of domestic prosecution, immunity statutes have

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[11] Resident aliens suspected of Nazi activities are particularly likely to be able to establish a real and substantial fear of foreign prosecution because deportation from the United States may not be optional, *see* 8 U.S.C. §§ 1251(a)(4)(D), 1253(h); *Linnas v. INS*, 790 F.2d 1024, 1029 & n.1 (2d Cir. 1986) ("The deportation of Nazi persecutors is required even though the deportee's life or freedom might be threatened as a result."); *Balsys*, 918 F. Supp. at 596 (discussing mandatory deportation of Nazi persecutors), and because some countries have no statute of limitations on such crimes. *See, e.g.*, Law Concerning Responsibility for Genocide of the People of Lithuania, No. 1-2477 (1992) (Lithuania), *as translated* in Joint Appendix at 207 (indicating that Lithuania joins the November 26, 1968 Convention for the Non-Applicability of a Statute of Limitations for War Crimes and Crimes Against Humanity).

become, over time, not only "a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify," but also "'part of our constitutional fabric.'" *Kastigar*, 406 U.S. at 446-47 (quoting *Ullmann v. United States*, 350 U.S. 422, 438 (1956)). And while the government must provide protection "as comprehensive as the protection afforded by the privilege," *Kastigar*, 406 U.S. at 449, the Supreme Court has not stated that the combination of use and derivative-use immunity and the exclusionary rule is necessarily the only method for achieving this.[12] The

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[12] A number of courts have suggested that Federal Rule of Criminal Procedure 6(e)(2), which establishes the general rule that grand jury testimony is secret, eliminates any reasonable ground for fearing foreign prosecution, and therefore prevents grand jury witnesses who fear foreign prosecution from invoking the privilege. *See, e.g., In re Baker*, 680 F.2d 721, 721 (11th Cir. 1982) (per curiam); *Baird*, 668 F.2d at 433; *United States v. Brummitt*, 665 F.2d 521, 524-26 (5th Cir. 1981); *United States v. Smith (In re Campbell)*, 628 F.2d 1260, 1262 (9th Cir. 1980); *United States v. Lemieux (In re Federal Grand Jury Witness)*, 597 F.2d 1166, 1167 (9th Cir. 1979) (per curiam); *United States v. Postal (In re Grand Jury Proceedings)*, 559 F.2d 234, 236-37 (5th Cir. 1977); *In re Long Visitor*, 523 F.2d 443, 447 (8th Cir. 1975); *United States v. Weir (In re Weir)*, 495 F.2d 879, 881 (9th Cir. 1974); *Tierney*, 465 F.2d at 811; *Parker*, 411 F.2d at 1069-70. *But see Araneta*, 794 F.2d at 925 (finding "the contrary authority to be more compelling"); *Chevrier*, 748 F.2d at 103-04; *Flanagan*, 691 F.2d at 123-24. Grand jury secrecy has many exceptions, however, and even when no exception applies, it largely depends on the largess of government officials who have access to grand jury minutes and of grand jurors who "might consciously or inadvertently leak confidential information." *Flanagan*, 691 F.2d at 123; *see also Cardassi*, 351 F. Supp. at 1082-83; *In re Flanagan*, 533 F. Supp. 957, 964-65 (E.D.N.Y.), *rev'd on other grounds*, 691 F.2d 116 (2d

way may be open, therefore, for the adoption of analogies to immunity statutes that would grant equivalent protection to witnesses whose fear is of foreign prosecutions.

While we need not pass on the constitutional sufficiency of any particular measures today, we note that extradition and deportation are not fixed practices. Congress may regulate extradition.[13] *See* 18 U.S.C.

Cir. 1982). Furthermore, "[a]lthough unauthorized disclosure of grand jury testimony is punishable by contempt, such *post hoc* penalties provide little protection for the witness" who is jeopardized by the disclosures. *Flanagan*, 533 F. Supp. at 965; *see also Flanagan*, 691 F.2d at 123; *Cardassi*, 351 F. Supp. at 1082. For these reasons, among others, we have deemed grand jury secrecy a constitutionally inadequate form of protection for those who fear foreign prosecutions. *See Chevrier*, 748 F.2d at 103-04; *Flanagan*, 691 F.2d at 123-24; *accord Tierney v. United States*, 410 U.S. 914, 916 (Douglas, J., dissenting from denial of certiorari) (stating that grand jury secrecy is insufficient protection to negate real fear of foreign prosecution because "[t]here are inumerable circumstances in which access to grand jury testimony can be had").

[13] Extradition treaties are self-executing, and therefore do not require implementing legislation to be binding as law. *See* U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ."); *Terlinden v. Ames*, 184 U.S. 270, 288 (1902) (stating that extradition treaties are self-executing); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) ("Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."). Nevertheless, Congress may change of the law of the land by statute, even when doing so is inconsistent with a treaty previously in existence. *See Clark v. Allen*, 331 U.S. 503, 508-09 (1947); *Grin v. Shine*, 187 U.S. 181, 191 (1902) ("[N]otwithstanding [an extradition] treaty, Congress has a perfect right to

§§ 3181-3196. And the executive branch has substantial discretion over extradition both by statute and through its role in negotiating treaties. *See* U.S. Const. art. II, § 2 (stating that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"); 18 U.S.C. § 3186 (stating that it is within the Secretary of State's discretion to determine whether an accused person is actually extradited); *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir.), *stay denied*, 117 S.Ct. 1491 (1997) (noting that procedures for extradition are governed by statute and that the Secretary may decline to extradite a witness "on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations"). Like extradition, deportation is also regulated by statutes, many of which give considerable discretion to the executive. *See* 8 U.S.C., Ch. 12.

It follows that Congress can pass laws regulating extradition and deportation in cases involving the privilege, just as it has enacted immunity statutes in the past to deal with fear of domestic prosecution.[14]

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provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient."); *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893) ("In our jurisprudence, it is well settled that the provisions of an act of Congress, passed in the exercise of its constitutional authority, . . . if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty.").

[14] It is noteworthy that the first federal immunity statute was not passed until 1857, and that it then applied only to those who testified before Congress or its committees. Act of Jan. 24,

For example, Congress could provide that no one who has been compelled to testify despite a well-founded fear of prosecution in a given country will be deported or extradited to that country (or to countries empowered to so extradite him). *See Flanagan*, 691 F.2d at 124 (suggesting that a law prohibiting the extradition of a witness who gives testimony pursuant to a grant of immunity would negate the real and substantial

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1857, 11 Stat. 155. Many additional federal immunity statutes have been passed since the 1857 Act. And the scope of the testimony covered by these statutes has expanded over the course of more than a century. *See generally*, Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 Yale L.J. 1568, 1571-78, 1611-12 (1963) (recounting the history of federal immunity statutes). But the costs to the government of the privilege notwithstanding, the Fifth Amendment was in full force long before these statutes became commonplace.

In deciding on the applicability of the privilege to those who fear foreign prosecution, we are thus in a position analogous to that of courts that, before immunity was available, interpreted the privilege with respect to domestic prosecution. These courts were not deterred by the costs to government law enforcement of permitting the privilege. *See, e.g., United States v. Burr (In re Willie)*, 25 F. Cas. 38, 39-40 (C.C.D. Va. 1807) (No. 14692E) (Chief Justice Marshall—acting as Circuit Justice in the trial of Aaron Burr—construing the scope of the Fifth Amendment privilege for the first time and rejecting the government's argument that the privilege should apply only when the answer to the question would be sufficient to convict the witness of a crime). Indeed, they even overturned early immunity statutes, despite the effect that doing so would have on domestic law enforcement. *See Counselman v. Hitchcock*, 142 U.S. 547, 564, 586 (1892) (considering the constitutionality of a federal immunity statute for the first time and declaring it unconstitutional because it did "not afford absolute immunity against future prosecution for the offence to which the question relates").

risk of prosecution).[15] Both Congress and the executive branch may thus be able to limit dramatically the domestic law enforcement costs of the interpretation of Fifth Amendment that we accept today by developing schemes that parallel domestic immunity statutes.[16]

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[15] Unless supplemented by some form of judicial enforcement, however, it is unlikely that such constructive immunity would be sufficient to accord witnesses the scope of protection guaranteed by the Constitution. *See Kastigar*, 406 U.S. at 461. And care is required if courts are to be able to enforce any such grant of constructive immunity in the context of extradition. For example, although the executive branch may make an extradition conditional, the courts cannot. *See, e.g., Kin-Hong*, 110 F.3d at 110; *Emami v. United States Distr. Ct.*, 834 F.2d 1444, 1453-54 (9th Cir. 1987). In this respect too, we find ourselves today in a very similar situation to that of the courts that considered the applicability of the privilege in cases involving domestic prosecutions before immunity statutes had been held to be constitutionally valid. *See supra* note 13.

[16] Of course, such changes in deportation and extradition practices would, to some extent, limit the freedom of the United States to deport or extradite as it chooses. In this respect, however, they simply parallel the effect, in domestic cases, of immunity statutes that greatly limit the government's capacity to prosecute the witness. And it is difficult to argue that foregoing a criminal prosecution is not as great a self-imposed limitation as foregoing the right to deport or to extradite a witness to the specific land the government would prefer. In any event, in both instances the limitation is self-imposed by the government in exchange for getting the testimony it seeks.

For related reasons, we find the suggestion by some courts that this application of the privilege undermines the sovereignty of the United States entirely unconvincing. *See, e.g., Araneta*, 794 F.2d at 926; *Balsys*, 918 F. Supp. at 599; *Lileikis*, 899 F. Supp. at 809. Since deportation and extradition are controlled by statute and executive discretion in the same way that

We conclude that the negative effect on domestic enforcement efforts of allowing the privilege is of the same order when the witness fears foreign prosecution as when he fears domestic prosecution, and is, in any event, not substantial enough to undermine the fact that granting the privilege to those who fear foreign prosecution is consistent with the language of the Fifth Amendment, with its aims, and with the reasoning of the most relevant Supreme Court cases. Like the panel in *Gecas*, we therefore believe that this application of the privilege "reasonably serves the purposes of the privilege and preserves the goals of domestic law enforcement." *Gecas*, 50 F.3d at 1565.

II. WAIVER

Balsys also alleges that the district court erred by holding that even if he were entitled to the protection of the Fifth Amendment, he waived his privilege when he first applied for immigration.

A witness may relinquish his Fifth Amendment privilege against self-incrimination. *See, e.g., Garner v. United States*, 424 U.S. 648, 654 n.9 (1976). A waiver need not be knowing and voluntary. *See id.* For instance, when a witness makes voluntary statements on a subject, he implicitly waives any subsequent claim of the privilege with respect to that subject. *See Rogers v. United States*, 340 U.S. 367, 373 (1951). However, "a waiver of the privilege in one proceeding

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domestic criminal law prosecution is, the privilege may be invoked by those who fear foreign prosecution only under the same circumstances as it may be used by those who fear domestic criminal proceedings, that is, when the government has passed laws and exercised discretion (or failed to do so) in such a manner as to make some criminal proceeding a real threat.

does not affect the rights of a witness or the accused in another independent proceeding." *United States v. Miranti*, 253 F.2d 135, 139 (2d Cir. 1958); *see also United States v. Housand*, 550 F.2d 818, 821 n.3 (2d Cir. 1977) (same); *United States v. Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979) (same); *United States v. Cain*, 544 F.2d 1113, 1117 (1st Cir. 1976) (same); *United States v. Lawrenson*, 315 F.2d 612, 613 (4th Cir. 1963) (same). *But see Ellis v. United States*, 416 F.2d 791, 800 (D.C. Cir. 1969) (declining to adopt, under the circumstances of that case, the prevailing rule that waiver of privilege in one proceeding does not affect rights in another proceeding).

On his visa application in 1961, Balsys voluntarily answered questions, under oath, concerning his activities during World War II. The district court found that, by answering such questions, Balsys waived his right to refuse to answer the questions OSI seeks to ask him now. It held that the visa application in 1961 and the OSI deportation hearing today are part of the same immigration proceeding.

The law of this circuit, however, does not support this result. Two proceedings must be considered separate where "during the period between the successive proceedings conditions might have changed creating new grounds for apprehension (e.g., the passage of new criminal laws) or that the witness might be subject to different interrogation for different purposes at the subsequent proceeding." *Miranti*, 253 F.2d at 140. Thus, when time passes and circumstances change between a waiver and a subsequent appearance, the initial waiver may not be applied to the subsequent event. *See, e.g., id.* (holding that "two appearances before the same grand jury separated by indictment and conviction for crimes

related to the original disclosures and the passage of nearly a year" are not a single proceeding).

Decades have passed since Balsys's application for a visa, and there have been substantial intervening changes in immigration law, in immigration procedures, and in the criminal law of Lithuania, Israel, and the United States. For example, Lithuania, which became an independent state in 1990, passed the retroactive statute under which Balsys fears prosecution in 1992. *See* Law Concerning Responsibility for Genocide of the People of Lithuania, No. 1-2477 (1992) (Lithuania), *as translated* in Joint Appendix at 207. We therefore conclude that Balsys's deportation hearing and his visa application are separate proceedings, and that any waiver Balsys may have made with respect to the visa application is not applicable to the questions asked by OSI.

Even if the visa application and deportation hearing constituted the same proceeding for Fifth Amendment purposes, we are doubtful that Balsys could have waived his privilege against self-incrimination in 1961 with respect to his activities during World War II. When Balsys completed his visa application, he had no Fifth Amendment rights:

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment.

Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (internal quotation marks and citation omitted). It is problematic, to say the least, to suggest that Balsys could have implicitly waived constitutional rights that he did not yet possess.

CONCLUSION

Because we do not find a significant difference in the harm to governmental interests from granting the privilege to those who fear foreign prosecutions, and to those who fear domestic prosecution, because the reasons for allowing the privilege are similar in both situations, and because the language of the amendment does not distinguish between the two, we hold that the Fifth Amendment privilege against self-incrimination may be invoked by a witness who possesses a real and substantial fear of foreign prosecution. Since Balsys is such a witness, and since we find that the district court erred in concluding that Balsys waived his right to invoke the privilege with respect to the current immigration investigation, we vacate the district court's order compelling compliance with the government's administrative subpoena and remand for proceedings consistent with this opinion.

BLOCK, District Judge, with whom Judge Calabresi joins, concurring:

I concur fully in Judge Calabresi's opinion, which I join. I also write separately, however, to express my concern, triggered by Judge Meskill's concurrence in the result, that our decision today may be perceived as qualifying the privilege in cases involving a real and substantial fear of foreign prosecution based upon

a case-by-case analysis of domestic law enforcement interests. According to Judge Meskill, the determinant in such an *ad hoc* scenario should be the balance to be struck between the enforcement of our organic laws and the protection that the Fifth Amendment privilege affords to the affected individual.

This relativist approach echoes the holding of *United States v. Lileikis*, 899 F. Supp. 802 (D. Mass. 1995), relied upon by the district court in this case. In *Lileikis*, the court attempted to stake out an intermediate position between the approach taken by the Court of Appeals for the Fourth Circuit in *United States v. (Under Seal) (Araneta)*, 794 F.2d 920 (4th Cir. 1986), which did not permit invocation of the privilege, and that of the Eleventh Circuit in *United States v. Gecas*, 50 F.3d 1549 (11th Cir. 1995), in which the privilege was permitted to be invoked. The *Lileikis* court, attempting "to borrow constructively" from both opinions, 899 F. Supp. at 808, held that where a witness invokes the privilege based upon a real and substantial fear of foreign prosecution, the privilege should nonetheless give way "[i]f a governmental interest in enforcing the organic laws of the United States is involved, and the United States has a legitimate need for a witness's testimony in furthering that interest. . . ." *Id.* at 809. At the same time, however, the court also determined that it was inappropriate to "bend the Constitution solely to promote the foreign policy objectives of the executive branch, however laudable, by compelling the cooperation of a witness in a proceeding that does not have as its fundamental purpose the vindication of the domestic laws of the United States." *Id.*

In my opinion, the privilege against self-incrimination is too principled a proposition to be

dependent upon the quantification of governmental interests and the unpredictability of *ad hoc* adjudication. There is nothing in the lexicon of Fifth Amendment jurisprudence that supports the thesis that, barring waiver, factors other than a legitimate fear of prosecution should enter into its calculus. While the debate on this issue, which has been taunting the courts ever since *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964) were decided in 1964, will continue until resolved by the Supreme Court, it seems to me that one must bite the conceptual bullet—either the privilege can be invoked by one facing a real and substantial fear of foreign prosecution, or it cannot—rather than grapple with balancing and qualifying the privilege's application.

In opting for its unqualified application, I am satisfied that the concerns of Judge Meskill and others over compromising the efficacy of domestic law enforcement will invariably be subsumed by the factors that enter into the threshold determination of the legitimacy of the fear, and some very practical realities.

In determining whether the requisite real and substantial fear of foreign prosecution exists, this court has identified five factors for consideration:

> whether there is an existing or potential foreign prosecution [against the witness]; what foreign charges could be filed against [the witness]; whether prosecution of them would be initiated or furthered by [the witness's] testimony; whether any such charges would entitle the foreign jurisdiction to have [the witness] extradited from the United States; and whether there is a likelihood

> that [the witness's] testimony given here would be disclosed to the foreign government.

United States v. Flanagan, 691 F.2d 116, 121 (2d Cir. 1982); *see also United States v. Chevrier*, 748 F.2d 100 (2d Cir. 1984); *United States v. Gilboe*, 699 F.2d 71 (2d Cir. 1983). The fear "must be a real and reasonable one, based on objective facts as distinguished from [the witness's] subjective speculation." *Flanagan*, 691 F.2d at 121; *Gecas*, 50 F.3d at 1553-66 (application by Eleventh Circuit of test similar to *Flanagan*). This rigorous test, requiring consideration, *inter alia*, of the likelihood that a witness's testimony would be disclosed to the foreign government and whether the foreign prosecution would be initiated or furthered by the testimony, *see Flanagan*, 691 F.2d at 121, will undoubtedly uncover those situations, such as *Gecas* and the present case, where the government is actively involved in facilitating a foreign prosecution and the risk of governmental overreaching is, therefore, sufficiently acute to warrant invocation of the privilege. But the test is also sufficiently rigorous to "eliminate[] the apprehension that a person could manufacture a potential for foreign prosecution or raise this specter solely to frustrate domestic law enforcement." *Gecas*, 50 F.3d at 1564. I agree, therefore, with the panel's rationale and conclusion in *Gecas*:

> Just as the privilege is extended to prevent overzealous prosecution and to constrain the government, the privilege creates in the individual the freedom to remain silent where the testimony may be adverse to his penal interests. One purpose need not eclipse the other in its function. If the court reasonably finds that the

> fear of foreign prosecution is an actuality rather than a mere speculation, the individual should prevail and be permitted to invoke the privilege. If the prospect of foreign prosecution is pure conjecture, then the importance of domestic law enforcement prevails, and the witness must testify. . . . [S]uch a balance both reasonably serves the purposes of the privilege and preserves the goals of domestic law enforcement.

Id. at 1564-65.

In any event, in a very real sense, I am not at all certain that the goals of domestic law enforcement would be significantly enhanced if the privilege could not be asserted. It simply cannot pragmatically be assumed that when faced with the "cruel trilemma of self-accusation, perjury or contempt," the choice would invariably be self-accusation. Balsys, for example, would obviously choose domestic contempt over foreign execution and it is unlikely, therefore, that the government would ever elicit from him the answers to its questions. The only practical domestic goal at stake would be the enforcement of our contempt laws, which are quite charitable. Had we held today that Balsys could not invoke the privilege, he initially would only be subject to civil contempt for his expected and rational silence. 28 U.S.C. § 1826(a) (1994); *Simkin v. United States*, 715 F.2d 34 (2d Cir. 1983). However, a court's authority to impose civil contempt sanctions "is limited by the concept that such sanctions are by their nature coercive rather than punitive." *United States v. Giraldo*, 822 F.2d 205, 210 (2d Cir. 1987); *see also United States v. Doe (In re Grand Jury Proceedings)*, 862 F.2d 430, 432 (2d Cir. 1988). By statute, the duration of a witness's

civil confinement for a refusal to testify in court is not permitted to exceed the duration of the court proceeding, or 18 months, whichever is shorter. 28 U.S.C. § 1826(a). Further, as a matter of common law, if it becomes clear during the witness's period of imprisonment that "there is no reasonable possibility that the sanction imposed for civil contempt will have the desired coercive effect, the sanction should be ended." *Giraldo*, 822 F.2d at 210; *see also Simkin*, 715 F.2d at 36-37; *Soobzokov v. CBS, Inc.*, 642 F.2d 28, 31 (2d Cir. 1981). Similarly, although the court is empowered to assess a fine, the fine cannot continue after the court has determined that the fine is not having a coercive effect. *See Soobzokov*, 642 F.2d at 31. As for criminal contempt pursuant to 18 U.S.C. § 401, while it is available once it is determined that the civil contempt remedy is unavailing, *see Simkin*, 715 F.2d at 37, it is unlikely to result in a prolonged period of incarceration. *See id.* at 38 ("fear may warrant lenient sentence of criminal contempt") (citing *Harris v. United States*, 382 U.S. 162, 166-67 (1965)).

In sum, for a witness facing a real and substantial fear of foreign prosecution, and foreign punishment, the choice of contempt may be preferable to the fate that awaits him abroad. Consequently, it is by no means assured that a different holding today would have a markedly different impact upon domestic law enforcement. To the extent that it does, the relinquishment of the enforcement of our contempt laws, such as they are, strikes me as a civilized trade-off for upholding a fundamental principle of individual dignity.

Judge Calabresi authorizes me to say that he concurs in this opinion.

MESKILL, Circuit Judge (concurring in the result):

I concur in the result.

OSI's mission is the investigation and institution of denaturalization and deportation proceedings of suspected Nazi war criminals. The issuance of the administrative subpoena here was in furtherance of that mission. The district court correctly concluded that the answers to the questions posed, if incriminating, would be shared with the government interested in prosecuting Balsys, and Balsys likely would be deported to Lithuania.

Thus, in this case the government's main interest in enforcing its organic laws is in facilitating a foreign prosecution. Therefore, in balancing the government's interest in domestic law enforcement with Balsys' interest in the protection the Fifth Amendment privilege affords, Balsys' interest is the weighty one. The Fifth Amendment protects Balsys' individual dignity and privacy, protects him against our government's pursuit of its goals by excessive means, and promotes the values of our justice system.

However, our decision today should not be interpreted as *carte blanche* for honoring a Fifth Amendment privilege against self-incrimination in all domestic proceedings where the recipient of the subpoena has a well-founded fear of foreign prosecution. Other scenarios may call for a different result. Therefore, rather than determining today that "cooperative internationalism" rises to the level of "cooperative federalism," and therefore causes concern for government overreaching in cases when a witness fears foreign prosecution and that there is a correla-

tion between real fear of foreign prosecution and government overreaching, as the majority opinion does, our decision should be limited to the facts before us and to OSI proceedings.

I also dissociate myself from that part of the majority opinion entitled "The Conflict Rarely Arises," because it is speculative and unnecessary to a resolution of this appeal. I also cannot support the discussion entitled "Parallels to Immunity Statutes May Be Enacted." The role of the judiciary is to decide cases, not to suggest to the Executive and Legislative branches of government ways to solve problems that our decision today may cause in the future. I believe it is better to limit our decision to the facts of this case and I concur in the result reached with the understanding that courts will interpret our decision in this limited way.

APPENDIX B

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-6144

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

ALOYZAS BALSYS, RESPONDENT-APPELLANT

[Filed Sept. 25, 1997]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the Appellee United States of America, and the panel that heard the appeal having filed an opinion on July 15, 1997,

IT IS HEREBY ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
George Lange III, Clerk
By:

/s/ BETH J. MEADOR
BETH J. MEADOR
Administrative Attorney

APPENDIX C

UNITED STATES DISTRICT COURT,
E.D. NEW YORK

No. 93 Misc. 227 (SJ).

UNITED STATES OF AMERICA, PETITIONER

v.

ALOYZAS BALSYS, RESPONDENT

[Filed: Mar. 5, 1996]

MEMORANDUM AND ORDER

JOHNSON, District Judge:

Pursuant to Section 235(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1225(a), as amended, the United States seeks to enforce an administrative subpoena issued by the Director of the Office of Special Investigations (the "OSI").[1] The subpoena was issued in conjunction with the OSI's civil investigation into Aloyzas Balsys's ("Respondent" or "Balsys") immigration and entry into the United States.

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[1] The OSI, an arm of the Criminal Division of the Department of Justice, was created by Attorney General Benjamin R. Civiletti in 1979 to investigate and institute denaturalization and deportation proceedings against suspected Nazi war criminals. *See* Order of the Attorney General, No. 851-79, September 4, 1979.

BACKGROUND

Aloyzas Balsys is a resident alien presently living in Woodhaven, New York. He was born on February 6, 1913 in Ansieniai, Plateliai Province, Lithuania and entered the United States on June 30, 1961 pursuant to Section 221 of the Immigration and Naturalization Act. In connection with his application to enter the United States, Balsys swore that the information contained in his application for Immigrant Visa and Alien Registration was true.[2] The OSI contends that Balsys lied in his immigration application about his activities during World War II.[3] Specifically, the OSI claims to have information and evidence that Balsys assisted the Nazi forces then occupying Lithuania, and that he participated in the persecution of persons because of their race, religion, and/or political opinion. If this information had been available to the government when Balsys applied for entry into the United States, his application would most likely have been denied. Now that Respondent is in the United States, this information, if true, would likely subject him to deportation.

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[2] Balsys's visa application stated, in relevant part:

> I understand that any willfully false or misleading statement or willful concealment of a material fact made by me herein may subject me to permanent exclusion from the United States and, if I am admitted to the United States, may subject me to criminal prosecution and/or deportation. Respondent's Application for Immigrant Visa and Alien Registration, Exhibit D to the Government's Petition.

[3] On his application, Balsys stated that between 1934 and 1940, he served in the Lithuanian Army, and from 1940 to 1944, he lived in Plateliai, Lithuania, and was "in hiding from N.K.V.D. and . . . Chairman of Municipality." *Id.* at p. 2.

In furtherance of its investigation into Balsys' wartime activities, the OSI issued an administrative subpoena commanding him to give testimony and to produce documents relating to his immigration to the United States, and to his activities in Europe between 1940 and 1945. In response, Balsys appeared at a deposition, and, after providing his name and address, asserted a Fifth Amendment privilege as to all other questions. He also refused to produce the documents described in the subpoena, with the exception of his alien registration card.

Balsys contends that he is entitled to the protection afforded by the Fifth Amendment based on his fear that answering the government's questions could subject him to prosecution by the governments of Lithuania, Germany and Israel. The United States challenges Balsys's assertion of the Fifth Amendment privilege on three grounds: (1) that Balsys has not demonstrated a real and substantial fear of foreign prosecution; (2) that, even if Balsys had shown a real fear of prosecution abroad, the Fifth Amendment privilege is not applicable when a claimant fears prosecution on the part of a foreign government; and (3) waiver.

For the reasons set forth below, this Court concludes that Balsys does in fact face a real and substantial danger of foreign prosecution. The Court also finds that, under the facts of the present case, the Fifth Amendment privilege does not provide protection against fear of incrimination under foreign law. Even if the Fifth Amendment were applicable to Balsys, this Court finds that his representations to the immigration authorities in 1961 constituted a waiver of those rights.

DISCUSSION

I. The Fifth Amendment Privilege

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." This privilege against self-incrimination "not only extends to answers that would in themselves support a conviction under a . . . criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime." *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L.Ed. 1118 (1951).

The privilege protects both witnesses and defendants in any proceeding, whether civil or criminal. *Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S. Ct. 1653, 1656, 32 L.Ed.2d 212 (1972). The witness may invoke the privilege, however, only if he "has reasonable cause to apprehend danger from a direct answer." *Hoffman*, 341 U.S. at 486, 71 S.Ct. at 818. A reasonable fear is one based on a prospect of penal liability that is "real and substantial" and not merely speculative. *Zicarelli v. New Jersey Investigation Commission*, 406 U.S. 472, 478, 92 S. Ct. 1670, 1675, 32 L.Ed.2d 234 (1972). *See also Marchetti v. United States*, 390 U.S. 39, 53, 88 S. Ct. 697, 705, 19 L.Ed.2d 889 (1968) ("The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination.").

The Fifth Amendment privilege against self-incrimination is available to resident aliens as well as

to American citizens. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 & n. 5, 73 S. Ct. 472, 477-78 & n. 5, 97 L.Ed. 576 (1953).[4] Balsys has no reason to fear domestic prosecution in this case,[5] and indeed he has not alleged any such fear. Rather, he charges that forcing him to testify regarding his activities during World War II and his immigration to the United States could subject him to prosecution by the governments of Lithuania, Germany and Israel. Thus, the issue before the Court is whether Balsys can avoid complying with the OSI subpoena by asserting the Fifth Amendment privilege against self-incrimination based on a fear of foreign prosecution.

II. Fear of Foreign Prosecution

To date, neither the Supreme Court nor the Second Circuit has decided the question of whether the Fifth Amendment privilege against self-incrimination can be asserted on the grounds of fear of foreign prosecution. In *Zicarelli v. New Jersey Investigation*

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[4] In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S. Ct. 1056, 1064, 108 L.Ed.2d 222 (1990), the Supreme Court limited its decision in *Kwong Hai Chew* to holding that a "resident alien is a 'person' within the meaning of the Fifth Amendment," but the Fourth Amendment prohibition against unlawful searches and seizures does not apply extraterritorially to aliens.

[5] 18 U.S.C. § 3282 establishes a five year statute of limitations for concealment of material fact or the making of false or fraudulent statements under 18 U.S.C. § 1001. Since Balsys entered the United States on June 30, 1961, the statute of limitations has long since run for any criminal charge that could have arisen from his immigration.

Commission, 406 U.S. 472, 92 S. Ct. 1670, 32 L.Ed.2d 234 (1972), the Supreme Court granted certiorari to consider this question but then determined that it was unnecessary because Zicarelli's fear of being prosecuted by a foreign court was remote and speculative. *Id.* at 478, 92 S. Ct. at 1675.[6] The court held that, assuming a fear of foreign prosecution is within the scope of the privilege, a witness can assert the privilege only after establishing that the information sought would tend to incriminate him under foreign law and pose a substantial risk of foreign prosecution. *Id.* at 480-81, 92 S. Ct. at 1676-77.

A. Real and Substantial Fear

In *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 121 (2d Cir. 1982), the Second Circuit identified a number of factors that bear on whether the witness's fear of foreign prosecution is real or imaginary. In making this determination, the Court should "focus on questions such as whether there is an existing or potential foreign prosecution of him; what foreign charges could be filed against him;

[6] Similarly, the Second Circuit has failed to reach the question of whether the Fifth Amendment privilege against self-incrimination may be invoked on the ground of potential foreign prosecution. *See In re Grand Jury Witness Gilboe*, 699 F.2d 71, 78 (2d Cir. 1983) (not necessary to decide Constitutional question because immunized grand jury witness's alleged fear of foreign prosecution was "at best speculative and remote"); *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 124 (2d Cir. 1982) (not necessary to decide Constitutional question because immunized grand jury witness "failed to demonstrate any real or substantial risk of foreign prosecution").

whether prosecution of them would be initiated or furthered by his testimony; whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States; and whether there is a likelihood that his testimony given here would be disclosed to the foreign government." *Id.*

Here, there is no existing foreign prosecution of Balsys. Balsys claims, however, that the testimony sought by the OSI would incriminate him under the laws of Lithuania, Germany and Israel, thereby subjecting him to potential prosecution.[7] In order to

[7] For example, some of the questions posed to Balsys by OSI are as follows:

Q: Where were you when the Soviets occupied Lithuania in June of 1940, Mr. Balsys?

Q: Mr. Balsys, what did you do during the Soviet occupation of Lithuania?

Q: Mr. Balsys, where were you in June of 1941 when the Germans occupied Lithuania?

Q: What did you do during the German occupation of Lithuania?

Q: When did you join the Villiaus Saugumas?

Q: Who is the commanding officer of the Villiaus Saugumas? Transcript of Deposition of Aloyzas Balsys, November 16, 1993, at p. 8.

Q: While you served in the Saugumas, did you work in the Communist and Jews section?

Q: Were you responsible for the arrest and imprisonment of Jews?

Q: While you served in the Villiaus Saugumas, did you work in the Polish section?

determine whether Balsys's answers would incriminate him, the Court must review the relevant criminal provisions from each sovereign.[8]

Q: Were you responsible for the arrest and imprisonment of Poles? *Id.* at p. 9.

Q: During the time that you served in the Villiaus Saugumas, did you work in the investigations section?

Q: Did you turn prisoners over to the Special Detachment? *Id.* at p. 10.

Q: At the time you applied to immigrate to the United States, why didn't you tell the U.S. Vice Consul in Liverpool that you had served in the Villiaus Saugumas?

Q: Were you afraid if you told the truth you would not be allowed to immigrate to the U.S.? *Id.* at p. 11.

Balsys refused to answer any of these questions, asserting the Fifth Amendment privilege. He also refused to answer questions directed at eliciting general biographical information, such as whether he is employed, whether he collects social security, and his present state of health. *See id.* at p. 4-5.

[8] The Court bases its discussion on foreign laws and treaties submitted by the Respondent. The government argues that Respondent has not provided any certified copies of the laws and treaties mentioned, and has failed to provide certified translations of the foreign language documents submitted. In addition, the government argues that Respondent offers no proof that the laws and treaties he cites are currently applicable.

Notwithstanding its objections, however, the government does not assert that the translations submitted by Respondent are inaccurate or that the foreign laws cited are invalid. The Court also notes that counsel for Respondent submitted virtually the same set of foreign laws, treaties and translations in *United States v. Gecas*, 50 F.3d 1549 (11th Cir. 1995), and the Eleventh Circuit relied on these submissions in its opinion.

In 1992, Lithuania adopted a statute punishing Nazis and Nazi collaborators for crimes committed against the Lithuanian people during World War II.[9]

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[9] Lithuania's "Law Concerning Responsibility for Genocide of the People of Lithuania" provides in pertinent part:

The Supreme Council of the Republic of Lithuania . . .

declaring that a policy of genocide and crimes against humanity was carried out against the populace of Lithuania during the period of occupation by Nazi Germany and the period of occupation and annexation by the USSR, in accordance with the generally recognized rule of the international community, that the destruction of people for any reason is perceived to be a crime, passes this law.

Article 1

Actions which strive, completely or in part, to physically destroy people who belong to any particular national, ethnic, racial or religious group, and which manifest themselves through the murder of members of these groups, brutal torture, physical maiming, mental retardation; the deliberate creation of such living conditions through which it is strived to completely or in part destroy persons from these groups; the forcible transfer of children from these groups to others or the use of means which seek to forcibly limit the birth rate (genocide)—

are punishable by incarceration for five to fifteen years along with the confiscation of belongings and property or by the death penalty along with the confiscation of belongings and property.

Article 2

The murder or torture of people in Lithuania, the deportation of her people, executed during the period of occupation by Nazi Germany or the period of occupation and annexation by the USSR, conform to the definition of crimes of genocide as indicated in the norms of international law.

The statute provides for punishments ranging from five years imprisonment to death. Law Concerning Responsibility for Genocide of the People of Lithuania, No. 1-2477, Article 1 (1992) (Lithuania), *as translated in* Appendix to Respondent's Memorandum at Tab 7. The law is retroactive, and there is no statute of limitations for prosecution of these crimes. *Id.*

In 1992, Lithuania also formed a commission to investigate crimes of genocide committed against the Lithuanian people during World War II when the country was under occupation by Germany and the Soviet Union. Resolution In re The Application of the Law "Concerning Responsibility for Genocide of the People of Lithuania," No. 1-2478 (1992) (Lithuania), *as translated in* Appendix to Respondent's Memorandum at Tab 7. In creating this commission, the Supreme Council of Lithuania resolved to enter into agreements with the United States, Israel and other states "for judicial assistance in cases involving the investigation of crimes of genocide." *Id.* In light of the above, the Court finds that the responses sought from Balsys by OSI could show that he engaged in conduct punishable under Lithuania's genocide law.

Article 3

> The law "Concerning Responsibility for Genocide of the People of Lithuania" is retroactive. A statute of limitations is not applicable in those criminal cases where individuals committed the actions described in this law up until the date it comes into force.

Law Concerning Responsibility for Genocide of the People of Lithuania, Num. 1-2477 (1992) (Lithuania), *as translated in* Appendix to Respondent's Memorandum at Tab 7.

Germany's murder statute, [StGB] Article 211, reads as follows:

Article 211 Murder

> (1) A murderer shall be punished by imprisonment for life.
>
> (2) A murderer is a person who kills another person from thirst for blood, satisfaction of his sexual desires, avarice or other base motives in a malicious or brutal manner or one dangerous to public safety or in order to permit the commission or concealment of another criminal act.

Article 211, *reprinted in* Adalbert Ruckerl, The Investigation of Nazi Crimes 1945-1978, at 41-42 (Derek Rutter, trans., 1979). Germany has prosecuted persons suspected of crimes against Jewish people under this statute, which apparently has no statute of limitations, for murders that occurred during World War II. It is not clear, however, whether this statute is applicable to non-German citizens alleged to have committed the punishable acts outside the territorial jurisdiction of Germany.[10]

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[10] In support of his contention that he has a reasonable fear of prosecution in Germany, Balsys has submitted a 1982 correspondence between former United States Attorney General William F. Smith and the former German Minister of Justice Jurgen Schmude. Appendix to Respondent's Memorandum at Tab 10. In that letter, Attorney General Smith recognized that "there [are] discrete legal questions in cases [regarding the extradition] of non-German citizens who acted beyond German borders." *Id.*

In addition, Balsys points to the case of Albert Helmut Rauca as an example of the German murder statute's applicability to non-German citizens accused of aiding and abetting the Nazis

If the statute does not cover crimes committed outside of Germany by non-German citizens, then the testimony sought by the OSI would not be incriminating to Balsys under German law.

Israel's "Nazis and Nazi Collaborators (Punishment) Law," 3710-1930 (1950) (Israel), applies extraterritorially and imposes the death penalty for persons who, "during the period of the Nazi regime, in an enemy country," committed crimes against Jewish people.[11] Thus, the responses sought from

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in territories occupied by Germany during World War II. Balsys asserts that Rauca, a non-German citizen residing in Canada, was extradited to Germany. Once there, he was tried for crimes that allegedly took place in Lithuania. Respondent's Memorandum at 11. Balsys also cites the case of Hermine Ryan, who was accused of being an S.S. Supervisory Warden at the Lublin Concentration Camp in Poland and was extradited from the United States to Germany in 1973. *See In re Ryan*, 360 F. Supp. 270 (E.D.N.Y.), *aff'd*, 478 F.2d 1397 (2d Cir. 1973). The Court notes, however, that the record does not reflect any direct evidence of these prosecutions.

[11] The Nazis and Nazi Collaborators (Punishment) Law, 3710-1930, states in pertinent part:

> 1. (a) A person who has committed one of the following offences—
>
> (1) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people;
>
> (2) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity;
>
> (3) done, during the period of the Second World War, in an enemy country, an act constituting a war crime, is liable to the death penalty.

Balsys by the OSI could incriminate him under Israeli law.

Although Germany's potential to prosecute Balsys remains unclear, the Court finds that if Balsys answered the OSI as anticipated his testimony would inevitably tend to incriminate him under both Lithuanian and Israeli law. Therefore, the Court concludes that there is the potential that Balsys could be prosecuted abroad despite the fact that no such prosecution has yet been initiated. Specifically, Balsys could be charged under Lithuania's Law Concerning Responsibility for Genocide of the People

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> (b) In this section—
>
> "crime against the Jewish people" means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:
>
> (1) killing Jews;
>
> (2) causing serious bodily or mental harm to Jews;
>
> (3) placing Jews in living conditions calculated to bring about their physical destruction; . . .
>
> (7) inciting to hatred of Jews; "crime against humanity" means any of the following acts:
>
> murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds;
>
> "war crime" means any of the following acts: murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.

Appendix to Respondent's Memorandum at Tab 14.

of Lithuania and under Israel's Nazis and Nazi Collaborators (Punishment) Law.

Under *Flanagan*, the Court must also consider the likelihood that Balsys's testimony would be disclosed to the governments of Lithuania and Israel. The OSI was created for the sole purpose of investigating and gathering evidence of alleged Nazi collaborators residing in the United States illegally, and taking legal action to denaturalize, deport or prosecute them. The Attorney General's order establishing the OSI states that the OSI shall:

1. Review pending and new allegations that individuals, who prior to and during World War II, under the supervision or in association with the Nazi government of Germany, its allies, and other affiliated governments, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin or political opinion;

2. Investigate, as appropriate, each allegation to determine whether there is sufficient evidence to file a complaint to revoke citizenship, support a show cause order to deport, or seek an indictment or any other judicial process against any such individuals;

3. Maintain liaison with foreign prosecution, investigation and intelligence offices;

4. Use appropriate Government agency resources and personnel for investigations, guidance, information, and analysis; and

5. Direct and coordinate the investigation, prosecution, and any other legal actions instituted in these cases with the Immigration and Naturalization Service, the Federal Bureau of Investigation, the United

States Attorneys Offices, and other relevant Federal agencies.

Order of Atty. Gen. 851-79 (Sept. 4, 1979).

In addition, the OSI has entered into an agreement to provide evidence that it has gathered on suspected Nazi collaborators to Lithuania. *See* Memorandum of Understanding Between the United States Department of Justice and the Office of the Procurator General of the Republic of Lithuania Concerning Cooperation in the Pursuit of War Criminals, August 3, 1992, U.S.-Lithuania [hereinafter "Memorandum of Understanding"]. This agreement states, in part, that:

> . . . [T]he United States Department of Justice agree[s] to provide . . . legal assistance concerning the prosecution of persons suspected of having committed war crimes in World War II in Lithuania and who are now residents of the United States—to facilitate the interview of witnesses, the conduct of other necessary activities, the collection of documentary materials and other information relevant to these investigations.

Memorandum of Understanding. The government claims that, to date, no country has expressed an interest in Balsys. This argument is inapposite. Whether or not Lithuania has to date expressed an interest in Balsys, the Court finds that his testimony here would in fact be disclosed based on the terms of the Memorandum of Understanding.

Similarly, the Court finds that there is a substantial likelihood that Balsys's testimony would be disclosed to Israel. Although the Court is not aware of any specific agreement between the United States

and Israel regarding the exchange of such information, the OSI has shared with Israel incriminating evidence that it gathered on suspected Nazi collaborator Ivan Demjanjuk. *See United States v. Gecas*, 50 F.3d 1549, 1558 (11th Cir. 1995). Given the OSI's duty to "maintain liaison with foreign prosecution, investigation and intelligence offices" and the fact that it has shared similarly incriminating evidence with Israel in the past, it appears that the OSI would in all probability disclose Balsys's testimony to Israel.[12]

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[12] The Court rejects the government's contention that a sealing order would eliminate Balsys's real and substantial fear of foreign prosecution. *Cf. United States v. (Under Seal) (Araneta)*, 794 F.2d 920, 924-25 (4th Cir.) (rejecting ability of protective order issued by the district court pursuant to Fed. R. Crim. P. 6(e) to protect witnesses from disclosure of grand jury testimony to foreign government because of foreign relations and importance of case), *cert. denied*, 479 U.S. 924, 107 S. Ct. 331, 93 L.Ed.2d 303 (1986); *In re Cardassi*, 351 F. Supp. 1080, 1082 (D.Conn.1972) (rejecting Fed. R. Crim.P. 6(e)'s ability to protect witness from disclosure of grand jury testimony to foreign government). Although the government has not requested that the Court place a sealing order on the deposition and transcripts, it would not oppose the issuance of such an order. The government asserts that a sealing order would ensure that the information gained from Balsys's testimony would not be disclosed to Israel or Lithuania.

In support of its argument, the government relies on the Seventh Circuit's decision in *In re Contempt Petition (Mikutaitis)*, 800 F.2d 159 (7th Cir. 1986). In that case, the OSI sought to depose Mikutaitis, who was of Lithuanian descent, as part of discovery in a denaturalization proceeding being conducted against another alleged Nazi collaborator in the Middle District of Florida. Despite a grant of immunity pursuant to 18 U.S.C. sec. 6002, Mikutaitis asserted the Fifth Amendment privilege based on his fear of prosecution by the Soviet Union for war crimes. The district judge assigned to the denaturalization case had attempted to shield Mikutaitis through a grant of immunity and an order that the deposition be put under seal.

Finally, under the *Flanagan* test the Court must consider the possibility that Balsys could be extradited from the United States to a foreign jurisdicion capable of prosecuting him. If Balsys is found to have lied about his activities during World War II on his visa application, he could be deported. If, in turn, Balsys is found to be deportable, the Attorney General of the United States has no discretion to prevent his deportation. *See* 8 U.S.C. §§ 1251(a)(4)(D), 1253(h) (designating participants in the Nazi persecution of persons during World War II "deportable aliens" and removing Attorney General's discretion

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The Seventh Circuit affirmed the district court's decision finding Mikutaitis in contempt for refusing to be deposed. *Id.* The court held that Mikutaitis was sufficiently protected by the safeguards ordered by the Florida court. In so ruling, the court reasoned that Mikutaitis had presented no evidence in support of his claim that the district court could not effectively limit access to the deposition or that "one of the parties, namely the OSI, is under some form of pressure to ignore the court's order and share the information . . ." *Id.* at 163.

The Court finds that the present case is distinguishable. The Seventh Circuit's decision in *In re Contempt Petition (Mikutaitis)* was based on the underlying premise that the OSI was under no pressure to disregard the sealing order. Here, Balsys has established that the OSI is indeed likely to disclose his testimony pursuant to the terms of the Memorandum of Understanding with Lithuania. *See also Gecas*, 50 F.3d at 1559 (rejecting the ability of a sealing order to protect witness where the OSI was under significant pressure to disclose the testimony based on the OSI's stated mission and the Memorandum of Understanding with Lithuania). Therefore, there is a substantial likelihood that any testimony provided by Balsys would be disclosed to Lithuania even if the deposition and transcript are sealed.

from withholding deportation); *Linnas v. I.N.S.*, 790 F.2d 1024, 1029 & n. 1 (2d Cir.) ("The deportation of Nazi persecutors is required even though the deportee's life or freedom might be threatened as a result."), *cert. denied*, 479 U.S. 995, 107 S. Ct. 600, 93 L.Ed.2d 600 (1986). The deportation of Balsys would thus amount to *de facto* extradition. *See Gecas*, 50 F.3d at 1560 (upholding district court's finding that deportation of the defendant, a suspected Nazi collaborator, was *de facto* extradition because defendant "would be forced to enter a country disposed to prosecute him").

The government contends that even if it secures an order deporting Balsys, he may designate the country to which he wishes to be deported. As the Eleventh Circuit reasoned in *Gecas*, however, Balsys's right to designate the country to which he would be sent "is subject to the Attorney General's discretionary conclusion 'that deportation to such country would be prejudicial to the interests of the United States.'" *Id.* (citing 8 U.S.C. § 1253(a)). Even if the Attorney General were to approve Balsys's country designation, that country could refuse to accept him because he is a suspected Nazi collaborator. If rejected by his designated country, Balsys would be sent to the country of which he is a citizen. *See* 8 U.S.C. § 1253(a). Thus, there is no guarantee that Balsys would be deported to the country of his choice.

Accordingly, under the *Flanagan* factors, the Court is persuaded that Balsys faces a "real and substantial" danger of prosecution by Lithuania and Israel. The Court must now consider whether Balsys may assert his Fifth Amendment privilege to avoid testifying.

B. Application of the Fifth Amendment

The Courts of Appeals which have considered the constitutional question of whether the Fifth Amendment privilege provides protection for a witness once it has been determined that he has a reasonable fear of foreign prosecution have reached different conclusions. The Fourth Circuit and the Tenth Circuit have held that a fear of foreign prosecution is not a sufficient basis for invoking the Fifth Amendment privilege. *See United States v. (Under Seal) (Araneta)*, 794 F.2d 920, 926-28 (4th Cir.) (the Fifth Amendment may not be invoked by a witness who fears foreign prosecution unless that foreign country also honors the privilege against self-incrimination), *cert. denied*, 479 U.S. 924, 107 S. Ct. 331, 93 L.Ed.2d 303 (1986) [hereinafter *Araneta*]; *In re Parker*, 411 F.2d 1067, 1069-70 (10th Cir. 1969) (holding that Fed. R. Crim. P. 6(e) would prevent disclosure of witness's testimony to foreign officials, thereby negating fear of foreign prosecution, and, alternatively, that "the fifth amendment provides no shelter . . . against incrimination in a foreign jurisdiction" where federal domestic immunity has been granted), *vacated as moot sub nom. Parker v. United States*, 397 U.S. 96, 90 S. Ct. 819, 25 L.Ed.2d 81 (1970).

In *Araneta*, the daughter and son-in-law of former Philippine President Ferdinand Marcos asserted the Fifth Amendment privilege and refused to testify before a grand jury investigating possible corruption in arms contracts with the Philippines. The Aranetas claimed that although they had been granted use and derivative use immunity (18 U.S.C. §§ 6002, 6003) and were thus protected from domestic

prosecution, their answers to the grand jury would incriminate them in a pending prosecution in the Philippines. Applying the factors set forth by the Second Circuit in *Flanagan*, the court concluded that the Aranetas had established a real fear of prosecution in the Philippines.

Despite the Aranetas' reasonable fear of foreign persecution, the court held that they could not claim the Fifth Amendment privilege before the grand jury "[s]ince the Fifth Amendment would not prohibit the use of compelled incriminating testimony in a Philippine court." *Araneta*, 794 F.2d at 926. In so ruling, the court reasoned that just as "[c]omity among nations dictates that the United States not intrude into the law enforcement activities of other countries conducted abroad," the United States' own sovereignty would be compromised if it were required "to forego evidence legitimately within its reach solely because a foreign power could deploy this evidence in a fashion not permitted within this country." *Id.*

The Eleventh Circuit, on the other hand, has held that the Fifth Amendment may be asserted by an individual on the basis of a fear of foreign prosecution. *See United States v. Gecas*, 50 F.3d 1549 (11th Cir. 1995). In *Gecas*, the defendant, also an alleged Nazi collaborator, claimed that the answers sought by the OSI in a deportation proceeding would incriminate him under the laws of Germany, Israel and Lithuania. Reversing the lower court's decision that the Fifth Amendment protection was not applicable to the defendant, the Eleventh Circuit "reject[ed] the district court's contention that the privilege *only* protects an individual's freedom from government

overreaching . . ." *Id.* at 1564, finding instead that "the Fifth Amendment privilege supports two goals: constraining the government from overzealous prosecution of individuals and securing individual liberties." *Id.* at 1562. The court based its holding on the notion that the Fifth Amendment privilege is "a personal right; [and] . . . a matter of individual dignity." *Id.* at 1564.

The district courts which have considered this issue have also varied in their conclusions. Several district courts have found that a fear of foreign prosecution is a valid basis for applying the Fifth Amendment. *See Mishima v. United States* 507 F. Supp 131, 134-35 (D. Alaska 1981) (privilege available to Japanese seaman being investigated in grounding of vessel); *United States v. Trucis* 89 F.R.D. 671, 673-74 (E.D. Pa. 1981) (privilege may be applied only "to those questions posing a real threat of incrimination," but not to questions about entry into the U.S. or naturalization proceedings); *United States v. Kowalchuk*, Civil Nos. 77-118 and 77-119 (E.D. Pa. October 20, 1978) (privilege applicable in denaturalization proceedings against brothers alleged to have achieved citizenship by concealing their participation in persecution of Jews in Poland on their visa application).

In a recent case in the District of Massachusetts, however, Judge Stearns held that "the government's purpose and need in seeking to compel a witness's testimony" must be examined in order to determine whether the witness may invoke the Fifth Amendment privilege based on a fear of foreign prosecution. *United States v. Lileikis*, 899 F. Supp. 802, 809 (D.

Mass. 1995). In that case, the government commenced a civil action to rescind the defendant's citizenship. In his answer to the complaint, the defendant, who was accused of committing acts of genocide in his native Lithuania, invoked the Fifth Amendment privilege against self-incrimination and refused to admit or deny the government's substantive allegations. Borrowing from both the *Araneta* and the *Gecas* opinions, the court concluded that:

> If a governmental interest in enforcing the organic laws of the United States is involved, and the United States has a legitimate need for a witness's testimony in furthering that interest, the privilege must yield if the sole basis for claiming its protections is the fact that a resident of the United States faces the likelihood of a foreign prosecution. It would be an unacceptable affront to the sovereignty of the United States if the operation of its laws could be stymied by the desire of a foreign government to prosecute the same witness. . . . On the other hand, I agree that a court of the United States should not bend the Constitution solely to promote the foreign policy objectives of the executive branch, however laudable, by compelling the cooperation of a witness in a proceeding that does not have as its fundamental purpose the vindication of the domestic laws of the United States.

Lileikis, 899 F. Supp. at 809.

Within the Second Circuit, Judge Newman, then sitting in the District of Connecticut, held in *In re Cardassi*, 351 F. Supp. 1080, 1081 (D. Conn. 1972), that the Fifth Amendment privilege is applicable where a witness fears foreign prosecution. That case involved

a grand jury witness who had been granted use immunity pursuant to 18 U.S.C. § 6003. The witness claimed the right to invoke the Fifth Amendment privilege based on her fear that, despite domestic use immunity, her testimony could be used against her in a foreign prosecution. The court reasoned that since the Supreme Court has construed the Fifth Amendment privilege to have the same scope under the United States Constitution as it has in England, where it applies to fear of foreign prosecution, the privilege can be claimed in proceedings in the United States by a witness who fears prosecution abroad. *Id.* at 1086.

With deference, this Court declines to follow the Eleventh Circuit's decision in *Gecas*. The Court is not unmindful of the Fifth Amendment's role in preserving an individual's privacy and dignity. *See Gecas*, 50 F.3d at 1564-65. This Court is of the opinion, however, that the *Gecas* holding allows foreign law to unreasonably infringe on domestic activity. This Court is similarly not persuaded by *In re Cardassi*. Instead, the Court finds the reasoning set forth by Judge Stearns in *Lileikis* persuasive given the facts of this case.

Balsys is a resident alien who allegedly entered the United States under false pretenses. The OSI seeks testimony from Balsys in conjunction with its investigation as to whether, on his application for an entry visa, he lied about his activities during World War II. Thus, the specific issue before the Court is whether an individual who was granted entry into the United States based on the government's reliance on the truthfulness of the sworn statements on his visa application can now take refuge in the Fifth

Amendment privilege and escape verifying the answers he gave on the document that served as his passport to America.

The Fifth Amendment is not applicable extra-territorially. *See Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936, 94 L.Ed. 1255 (1950). It serves to regulate the relationship between federal and state governments and their citizens. The Supreme Court has stated that the privilege against self-incrimination reflects

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load."

Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55, 84 S. Ct. 1594, 1597, 12 L.Ed.2d 678 (1964) (citation omitted). This Court agrees with the Fourth Circuit that these values would not be vitiated by a decision declining to extend the privilege against self-incrimination in the present case. *See Araneta*, 794 F.2d at 926 ("Our decision that the Aranetas cannot find shelter in the Fifth Amendment does not imperil [the] values [underlying the Fifth Amendment]."). Balsys does not face the possibility of domestic prosecution, thus there is no incentive for the government to elicit self-incriminating state-

ments from Balsys by "inhumane treatment and abuses." *Murphy*, 378 U.S. at 55, 84 S. Ct. at 1597. Moreover, because the United States Constitution is not applicable in Israel or Lithuania, allowing Balsys to invoke the Fifth Amendment privilege will not serve to promote the principles underlying our criminal justice system.

Rather, to allow Balsys to invoke the privilege would unreasonably impinge on the government's ability to monitor and verify immigration and visa applications. As stated by the court in *Lileikis*, "the United States cannot be deterred by the threat of a prosecution by a foreign sovereign from gathering evidence for its own purposes." 899 F. Supp. at 807. The government has a strong interest in determining whether or not an individual misrepresented information on his visa application. In seeking to compel Balsys's testimony, the government's primary purpose is "the vindication of the domestic laws of the United States." *Id.* at 809. Although Balsys does indeed have a real and substantial fear of prosecution by Lithuania and Israel, the laws of the United States should not be sacrificed where the government has established an independent and legitimate need for his testimony.

In declining to extend the Fifth Amendment privilege in the present case, the Court concludes that the fundamental purpose of the privilege is to protect individuals against governmental overreaching. Balsys seeks to assert the privilege as a means to thwart the enforcement of domestic law. This is contrary to the values the Fifth Amendment was intended to protect. Although Balsys may suffer harm as a result of the incriminating nature of the

disclosure, the government has a valid purpose. There is no indication that the government's motive is malicious, or that the government is engaging in "overzealous prosecution."

A contrary decision by this Court would allow individuals attempting to immigrate to the United States to misrepresent their personal histories and other relevant information in order to gain access to this country, leaving the government without recourse and seriously eroding domestic law enforcement. Accordingly, the Court concludes that Respondent is not entitled to invoke the Fifth Amendment privilege against compelled self-incrimination.

Although this holding is limited to the facts of the present case, the Court is of the opinion that the Fifth Amendment was intended to preserve a witness's individual privacy only in the context of a criminal prosecution by our state or federal government and for the sole purpose of preventing governmental overreaching. This Court therefore believes that the Fifth Amendment privilege cannot be asserted by a witness who fears prosecution under the criminal laws of a foreign sovereign.

III. Waiver of Fifth Amendment Privilege

Even if Balsys were entitled to the protection of the Fifth Amendment, the Court finds that he waived any such privilege when he first applied for immigration and answered questions posed to him by government officials.

Voluntary statements on a given subject constitute an implied waiver of any subsequent Fifth Amendment claim related to that subject. *Rogers v. United States*, 340 U.S. 367, 371, 71 S. Ct. 438, 441, 95 L.Ed. 344 (1951); *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942). Statements made in one proceeding, however, cannot constitute a waiver of the privilege at a separate proceeding. *See United States v. Housand*, 550 F.2d 818, 821 n. 3 (2d Cir.), *cert. denied*, 431 U.S. 970, 97 S. Ct. 2931, 53 L.Ed.2d 1066 (1977).

The Court finds that the present case does not involve two separate proceedings. In 1961, Balsys initiated immigration proceedings which remain open today. When he first applied for an immigrant visa in 1961, officials at the United States Consulate in Liverpool, England made inquiries into his prior record of employment and his activities during World War II. At that time Balsys voluntarily responded to such questioning, and testified under oath regarding the nature of his wartime activities in Europe and his immigration to the United States. Balsys's answers to questions about his whereabouts and activities from 1934 to 1944, whether given in 1961 or today, are part of the same proceeding. Therefore, this Court concludes that Balsys's representations to immigration authorities constituted a waiver of any Fifth Amendment privilege which he now claims in response to questions posed by the OSI concerning his procurement of a United States immigrant visa.

IV. Production of Documents

Balsys has also invoked the Fifth Amendment privilege in refusing to produce the documents described in the subpoena. Although the privilege generally does not apply to requests to produce documents, the

very act of producing the documents may have "communicative aspects which rise to the level of a testimonial communication, as where merely acknowledging possession of the documents would be an incriminating admission." *Matter of Grand Jury (Markowitz)*, 603 F.2d 469, 477 (3d Cir. 1979). *See also United States v. Doe*, 465 U.S. 605, 612, 104 S. Ct. 1237, 1242, 79 L.Ed.2d 552 (1984) (noting that act of production may be testimonial). Balsys has made no showing, however, that the production of such documents would be testimonial in nature. *See Matter of Grand Jury (Markowitz)*, 603 F.2d at 476 ("A witness who produces preexisting documents pursuant to subpoena does not testify as to all facts which the documents themselves may reveal.").

CONCLUSION

For the reasons stated above, the government's motion for an order compelling compliance with its administrative subpoena is hereby GRANTED with respect to both the deposition questions the OSI wishes to ask of the Respondent and the documents described in the subpoena.

SO ORDERED.